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# Prenuptial Agreements: A New Reason to Revive an Old Rule

Jeffrey G. Sherman

IIT Chicago-Kent College of Law, [jsherman@kentlaw.iit.edu](mailto:jsherman@kentlaw.iit.edu)

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# PRENUPTIAL AGREEMENTS: A NEW REASON TO REVIVE AN OLD RULE

JEFFREY G. SHERMAN<sup>1</sup>

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Redefining marriage in a way that reduces it to a financial and legal relationship will only accelerate the deterioration of family life.

Sen. John Cornyn (R-Texas)<sup>2</sup>

I couldn't agree more. Marriage is a bond that should be kept as distinct as possible from mere partnerships. Senator Cornyn made these remarks in an attempt to counter Congressman Barney Frank's (D-Mass.) observation that allowing same-sex couples to marry does not harm anyone else's marriage. Now, I share Senator Cornyn's desire to prevent the mercantilization of marriage, but the way to accomplish that goal is not to bar same-sex marriages but rather to bar the enforcement of prenuptial property-apportionment agreements—that is, to revive an

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<sup>1</sup> Professor of Law, Senior Advisor, Graduate Tax Program, Chicago-Kent College of Law, Illinois Institute of Technology. A.B.; 1968, J.D., 1972, Harvard. In writing this article, I have benefited enormously from the shrewd advice and sternly critical judgments of Brian Bix, Daniel Hamilton, and Christopher Leslie, and I am grateful to them for their interest and assistance. I must also thank my diligent and skillful student research assistants, Shani Austin, Andrew Corbett, Anna Misfeldt, and Hart Rosenblatt. And I should like to thank the Marshall D. Ewell Research Fund for providing support for the writing of this article.

<sup>2</sup>See *Gay Lawmaker Testifies: "Who Are We Hurting?"*, CHI. TRIB., Mar. 24, 2004, at 11.

old *per se* rule—since it is prenuptial agreements, not same-sex unions, that can “reduce” marriage to a financial relationship.<sup>3</sup>

Until the 1970s, American courts uniformly refused, on public policy grounds, to enforce prenuptial agreements designed to apportion property in the event of divorce.<sup>4</sup> They regarded the enforcement of such contracts as inimical to the stability of marriage.<sup>5</sup> But this view softened over the years as courts came to regard the

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<sup>3</sup>Couples sometimes include behavioral provisions in their prenuptial contracts, with mixed results, in an attempt to regulate conduct during the marriage rather than to apportion property rights upon termination of the marriage. *See, e.g.*, *Favrot v. Barnes*, 332 So. 2d 873, 875 (La. Ct. App. 1976), *rev'd on other grounds*, 339 So. 2d 843 (La. 1976) (refusing to treat as marital “fault” a wife’s demand for sexual intercourse more than the once per week stipulated in the couple’s prenuptial agreement); *Koch v. Koch*, 232 A.2d 157, 159-60 (N.J. Super. Ct. App. Div. 1967) (refusing to enforce a prenuptial agreement that the husband’s mother would reside with the couple); *Ramon v. Ramon*, 34 N.Y.S.2d 100, 111 (Fam. Ct. 1942) (enforcing a prenuptial agreement regarding the religious upbringing of the marital children). *See generally* James Herbie Difonzo, *Customized Marriage*, 75 IND. L.J. 875, 939, 955-56 (2000). Such behavioral provisions lie beyond the scope of this article.

<sup>4</sup>These contracts are also known as “antenuptial agreements” or “premarital agreements.” In view of the increasing popularity of the vernacular term “prenup,” I have elected to favor the term from which “prenup” was derived.

<sup>5</sup>*See infra* text accompanying note 84. Even when American courts were unwilling to enforce prenuptial property-apportionment agreements upon divorce, they *were* willing to enforce them at death. That is, if a contract between a prospective husband and a prospective wife purported to limit her share of marital property in the event of divorce and her share of the husband’s estate in the event he predeceased her, a court that was unwilling to enforce the former provision would nonetheless enforce the latter. *See, e.g.*, *McNutt v. McNutt*, 19 N.E. 115 (Ind. 1888); *In re Muxlow Estate*, 116 N.W.2d 43 (Mich. 1962); *Cronacher v. Runge*, 98 S.W.2d 603 (Mo. 1936); *In re Estate of Eisner*, 181 N.Y.S.2d 327 (Sur. Ct. 1959); *see also* *Uhrig v. Pulliam*, 713 S.W.2d 649 (Tenn. 1986).

The doctrinal explanation [for this difference in treatment] was that death-focused premarital agreements did not give either party an incentive to divorce. One also might speculate that an attempt to keep a family heirloom or other family property within a family—apparently a common purpose of such agreements—is more sympathetic than a divorced-focused agreement, in which, paradigmatically, a richer prospective spouse asks a poorer prospective spouse to give up rights to all but a small part of the wealth and income of the richer prospective spouse.

Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 WM. & MARY L. REV. 145, 153 (1998) (footnotes omitted). One might quarrel with the proposition that a death-focused prenuptial agreement does not give either spouse an incentive to divorce; one can readily imagine that

a dissatisfied wife—secure in the knowledge that the provisions for alimony contained in the antenuptial agreement could not be enforced against her, but that she would be bound by the provisions limiting or waiving her property rights in the estate of her husband—might provoke her husband into divorcing her in order to collect a large alimony check . . . rather than take her chances on being remembered generously in her husband’s will.

*Posner v. Posner*, 233 So. 2d 381, 383 (Fla. 1970), *rev'd on other grounds*, 257 So. 2d 530 (Fla. 1972). Of course, a wife might make the same strategic determination even in the absence of a prenuptial agreement if she were confident that state alimony and division-of-property laws provided more generous benefits than her husband’s probable will or the state’s elective share statute. In any case, the enforceability of death-focused prenuptial

societal interest in marriage as less compelling than the individual's interest in his own autonomy. Today, "divorced-focused premarital agreements regarding the division of property and spousal support are . . . enforceable in almost every state,"<sup>6</sup> despite warnings from a number of scholars that this development operates to the disadvantage of women.<sup>7</sup> So here I stand, urging that we revive the old rule prohibiting altogether the enforcement of prenuptial agreements, but I do so not because these agreements encourage divorce or disfavor women, but rather because they permit married couples, inequitably, to make simultaneous, inconsistent claims: that of forming a privileged unit founded on mutual sacred pledges of devotion and loyalty, and that of being parties to a custom-built partnership between two autonomous bargainers.<sup>8</sup> This inequity is not an inequity between men and women; that inequity will, it is hoped, vanish over time. Rather, the inequity of which I speak is an inequity between the married and the unmarried.

This article is divided into five parts. The first part discusses the justification for our society's continued promotion of the institution of marriage. The second discusses why prenuptial agreements have become so widespread. The third gives an account of American courts' shift from rejecting prenuptial agreements to routinely enforcing them. The fourth presents my argument for treating as inequitable *per se* the enforcement of prenuptial agreements. And the fifth explores how the adoption of my view of prenuptial agreements might affect the popularity of marriage.

#### I. HOW MARRIAGE HELPS OUR SOCIETY

It is by now a commonplace observation that American law confers on married couples numerous benefits and privileges not conferred on unmarried couples.<sup>9</sup> I am prepared to defend these legal incentives to marry and stay married because the

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*agreements is sufficiently noncontroversial that this article will be concerned solely with the enforceability of divorce-focused agreements.*

<sup>6</sup> Bix, *supra* note 5, at 158.

<sup>7</sup> *E.g.*, Gail Frommer Brod, *Premarital Agreements and Gender Justice*, 6 YALE J.L. & FEMINISM 229 (1994).

<sup>8</sup> I make no objection to the enforcement of divorce-related settlement agreements or other postnuptial contracts affecting the distribution of property. In a postnuptial settlement, the parties bargain in the shadow of state default rules that have in fact already become enforceable: state default rules premised on the "mutual sacred pledges" view of marriage.

<sup>9</sup> In 1997, the General Accounting Office reported that 1,049 federal laws condition benefits and privileges on one's marital status. U.S. GEN. ACCOUNTING OFFICE, DEFENSE OF MARRIAGE ACT, GEN. ACCOUNTING OFFICE REP. OGC-97-16, at 2 (1997). Professor Janet Halley of Harvard Law School "acknowledges 'the tremendous asset transfers to marriages in our system' that serve as 'subsidies' to encourage and support marriage." Harbour Fraser Hodder, *The Future of Marriage*, 107 HARV. MAG. 38, 43 (Nov.-Dec., 2004).

institution of marriage benefits society as a whole.<sup>10</sup> But in what way does marriage benefit society?<sup>11</sup>

For most Americans, child-rearing, though undeniably important, is not the primary consideration underlying marriage. In a 24-nation comparative poll sponsored by the National Opinion Research Center at the University of Chicago, subjects were asked whether they agreed or disagreed with various statements. With the statement "The main purpose of marriage these days is to have children," 69.5% of the U.S. subjects disagreed; that was the second-highest rate of disagreement among the 24 nations surveyed (only New Zealand was higher).<sup>12</sup> And the United States Supreme Court has held on a number of occasions that States may not condition the right to marry on an intention to produce or an ability to provide for children.<sup>13</sup> Rather, Americans see marriage as an institution primarily related to romantic love and companionship.<sup>14</sup>

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<sup>10</sup>See *Zablocki v. Redhail*, 434 U.S. 374, 403 (1978) (Stevens, J., concurring) ("When a State allocates benefits or burdens, it may have valid reasons for treating married and unmarried persons differently. Classification based on marital status has been an accepted characteristic of tax legislation, Selective Service rules, and Social Security regulations.").

<sup>11</sup>By "marriage" I refer principally to solemnized marriage as opposed to so-called common law marriage. The latter institution treats a man and woman as married, even though they have not obtained a marriage license and gone through an established ceremonial proceeding, if they (1) intended to enter into a husband/wife relationship, (2) openly lived together as husband and wife, and (3) have met certain other conditions that vary somewhat from state to state. Today, only 11 states and the District of Columbia recognize common law marriage, LAWRENCE W. WAGGONER ET AL., *FAMILY PROPERTY LAW* 84 (3d ed. 2002), although, under well-established conflicts rules, the remaining states will recognize as valid within their own borders common law marriages inaugurated in a state that allows them. *E.g.*, *Blaw-Knox Constr. Equip. Co. v. Morris*, 596 A.2d 679 (Md. Ct. Spec. App. 1991); *Peffley-Warner v. Bowen*, 778 P.2d 1022 (Wash. 1989). But inasmuch as the marital benefits of which I am about to speak are more likely to be associated with solemnized marriage than with common law marriage, I shall confine my discussion to the former. See Craig A. Bowman & Blake M. Cornish, Note, *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 92 COLUM. L. REV. 1164, 1185 (1992) ("[Even if] marriage conferred no legal rights or obligations, it seems likely that the state would continue to solemnize marriages because that is what people want—a public commitment and a right to hold themselves out as something different [from what] they were before the marriage.").

<sup>12</sup>TOM W. SMITH, NAT'L OPINION RESEARCH CTR., UNIV. OF CHICAGO, *THE EMERGING 21st CENTURY AMERICAN FAMILY* 11 (1999), available at <http://www.norc.uchicago.edu/online/emergerge.pdf> (on file with author).

<sup>13</sup>*E.g.*, *Turner v. Safley*, 482 U.S. 78, 95-96 (1987) (holding that prison inmates have a constitutional right to marry even though they will never be able to cohabit with their spouses or consummate the marriage); *Zablocki v. Redhail*, 434 U.S. 374, 390-91 (1978) (holding that a state may not bar an indigent person from obtaining a marriage license merely because he already has children from a previous liaison who are public charges).

<sup>14</sup>SMITH, *supra* note 12, at 11. This American perspective on marriage—like so many American perspectives—has its roots in seventeenth century English Puritanism. One modern scholar, after remarking upon the lack of what we should regard as emotional intimacy in the marriages depicted in Shakespeare's plays, observed:

Shakespeare was not alone in his time in finding it difficult to portray or even imagine marital intimacy. It took decades of Puritan insistence on the importance of

The core notion is “belonging,” to use Dean Hafen’s deceptively artless term.<sup>15</sup> We are, as a species, social creatures, unable to flourish without a sense of connectedness.

Man, said Aristotle, is the least self-sufficient of animals. But the human individual is not merely an animal who happens to lack self-sufficiency; he is an animal whose essence it is to lack self-sufficiency. We *need* each other, and it is Aristotle’s task to make, as it were, a virtue of this necessity. The life of belonging to a *polis* is not . . . a grudging dependence, but a positive and essentialist embrace of interdependence.<sup>16</sup>

Personal intimacy fosters this willingness to embrace interdependence, and it does so not simply by alleviating the pain of loneliness or easing “the existential sadness that comes from relating to other persons only through one’s bargains and episodic encounters,”<sup>17</sup> but by providing an environment in which the skills and habits of harmonious engagement—so necessary to our collective well-being—may be honed and applied.<sup>18</sup>

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companionship in marriage to change the social, cultural, and psychological landscape. By the time Milton published *Paradise Lost* in 1667, the landscape was decisively different. Marriage was no longer the consolation prize for those who did not have the high vocation of celibacy; it was not the doctrinally approved way of avoiding the sin of fornication; it was not even principally the means of generating offspring and conveying property. It was about the dream of long-term love.

STEPHEN GREENBLATT, *WILL IN THE WORLD: HOW SHAKESPEARE BECAME SHAKESPEARE* 128-29 (2004). Although he does not say so, Professor Greenblatt’s references to marriage as a consolation prize and as an approved way of avoiding fornication presumably have their roots in one of the Epistles of St. Paul:

Yes, it is a good thing for a man not to touch a woman; but since sex is always a danger, let each man have his own wife and each woman her own husband. . . . There is something I want to add for the sake of widows and those who are not married: it is a good thing for them to stay as they are, like me [i.e., celibate], but if they cannot control the sexual urges, they should get married, since it is better to be married than to be tortured.

*1 Corinthians 7:1-2 & 7:8-9 (Jerusalem Bible).*

<sup>15</sup>See Bruce C. Hafen, *Individualism and Autonomy in Family Law: The Waning of Belonging*, 1991 BYU L. REV. 1 (1991).

<sup>16</sup>Jeremy Waldron, *Minority Cultures and the Cosmopolitan Alternative*, 25 U. MICH. J.L. REFORM 751, 767 (1992) (footnotes omitted).

<sup>17</sup>Anita Bernstein, *For and Against Marriage: A Revision*, 102 MICH. L. REV. 129, 200 (2003) (eloquently summarizing the views expressed in Milton C. Regan, Jr., *Postmodern Family Law: Toward a New Model of Status*, in PROMISES TO KEEP: DECLINE AND RENEWAL OF MARRIAGE IN AMERICA 157 (David Popenoe et al. eds., 1996)); see also Jane Larson, *The Sexual Injustice of the Traditional Family*, 77 CORNELL L. REV. 997, 999 (1992) (“It is within families that . . . we seek and give the love and companionship that makes it possible for us to survive the loneliness and harshness of our lives.”).

<sup>18</sup>See Katharine K. Baker, *Biology for Feminists*, 75 CHI.-KENT L. REV. 805, 831 (2000) (“Spouses . . . have always provided a forum for intimacy by allowing their partners to feel less atomized, more emotional, and more connected to others. This work—which is the work of intimacy—and the feelings it engenders should be recognized as important, possibly even crucial, to our collective well-being.”) (footnote omitted).

The struggle for intimacy, if successful, yields not only individual benefits but societal benefits. Like any struggle, the pursuit of intimacy requires effort, and state-sanctioned marriage offers the individual a respite from that effort. Paradoxically, the “bond” of matrimony liberates the individual so that he may make himself more valuable to the *polis*:

The marital bond that now holds opposite-sex couples together (and by example encourages same-sex couples to think of themselves as conjoined) would loosen [if state-sponsored marriage were abolished]; pairing-off might grow more provisional, requiring more effort to keep up. These struggles would take time away from other pursuits. It seems plausible to speculate that individuals who can never obtain respite from competing for intimacy would have less to offer (including, for example, political engagement, the building of economic wealth, the care of children, or expanding the frontiers of human knowledge and accomplishment) than those not competing in this market.<sup>19</sup>

The more reliable the bond, the greater the liberation and the greater the societal benefit. And marriage has shown itself to be more reliable than (heterosexual) cohabitation, even in an age when Americans believe they have a “fundamental right to marry, and marry, and marry.”<sup>20</sup>

Compared with heterosexual cohabitation, marriage is more stable and its commitments are more durable.<sup>21</sup> Some of this greater stability results from the powerful societal endorsement—the governmental grant of a license, the judicial or sacramental solemnization—that marriage enjoys.<sup>22</sup> But much of the stability is attributable to the barriers to marital dissolution that the law imposes: the greater exit costs for marital partners than for “mere” cohabitants.<sup>23</sup> Social scientists have

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<sup>19</sup>Bernstein, *supra* note 17, at 206; *see also* Stephanie Coontz, *Marriage, A History From Obedience to Intimacy, or How Love Conquered Marriage* 309 (2005).

[Marriage] remains the highest expression of commitment in our culture and comes packaged with exacting expectations about responsibility, fidelity, and intimacy. Married couples may no longer have a clear set of rules about which partner should do what in their marriage. But they do have a clear set of rules about what each partner should *not* do. And society has a clear set of rules for how everyone else should and should not relate to each partner. These commonly held expectations and codes of conduct foster *the predictability and security that make daily living easier*.

*Id.* at 309 (*second emphasis added*). *See also* Hafen, *supra* note 15, at 41.

<sup>20</sup>Mary Ann Glendon, *The New Marriage and the New Property*, in *MARRIAGE AND COHABITATION IN CONTEMPORARY SOCIETIES: AREAS OF LEGAL SOCIAL AND ETHICAL CHANGE* 59, 63 (John M. Eekelaar & Sanford N. Fetz eds., 1980).

<sup>21</sup>Steven L. Nock, *A Comparison of Marriages and Cohabiting Relationships*, 16 J. FAM. ISSUES 53, 56 (1995).

<sup>22</sup>*See supra* note 11 and accompanying text; *see also infra* note 178 and accompanying text.

<sup>23</sup>*See* Nock, *supra* note 21, at 56.

Marriage differs so much from cohabitation legally because of the durability of the commitments involved. Even after a divorce, one may be held legally obligated to an ex-spouse (and to children). . . . Moreover, the legal events of marriage (e.g., formalization of the union requiring significant effort to terminate it or legal

found that marital partners are more committed to each other than unmarried heterosexual cohabitants.<sup>24</sup> Because of the higher exit costs, marital partners invest more in their relationship than do unmarried cohabitants.<sup>25</sup> For example:

We found [heterosexual] cohabitators more likely than married people to engage in infidelity, even when we controlled for permissiveness of personal values regarding extramarital sex. This finding suggests that cohabitators' lower investments in their unions [i.e., because exit costs are higher when you're married, cohabitators risk less by having an affair than married persons do], not their less conventional values, accounted for their greater risk of infidelity.<sup>26</sup>

This is not to say that matrimonial bonds are an unmixed blessing for the individual,<sup>27</sup> but the greater stability of marital relationships generates collective benefits.

## II. WHY PRENUPTIAL AGREEMENTS ARE POPULAR

Prenuptial agreements are hardly a new phenomenon, but they began life not as divorce-focused instruments but as death-focused instruments. And, unlike today's agreements, they were not designed to protect the assets of the husband.<sup>28</sup> Starting in

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assumptions about joint property) serve as . . . *barriers* that hold the relationship together.

*Id.*

<sup>24</sup>J. Thomas Oldham, *Unmarried Partners and the Legacy of Marvin v. Marvin: Lessons from Jerry Hall v. Mick Jagger Regarding U.S. Regulation of Heterosexual Cohabitants, or Can't Get No Satisfaction*, 76 NOTRE DAME L. REV. 1409, 1426-27 (2001).

<sup>25</sup>*Cf.* *Sidney v. Sidney*, 4 Swab. & Tris. 178, 182, 164 Eng. Rep. 1485, 1486 (1865) ("Those for whom shame has no dread, honourable vows no tie, and violence to the weak no sense of degradation, may still be held in check by an appeal to their love of money.").

<sup>26</sup>Judith Treas & Deidre Giesen, *Sexual Infidelity Among Married and Cohabiting Americans*, 62 J. MARRIAGE & FAM. 48, 59 (2000).

<sup>27</sup>Married women do more housework than unmarried women. M.V. LEE BADGETT, MONEY, MYTHS, AND CHANGE: THE ECONOMIC LIVES OF LESBIANS AND GAY MEN 147 (2001) (citing Scott J. South and Glenna Spitze, *Housework in Marital and Nonmarital Households*, 59 AM. SOCIOLOGICAL REV. 327-48 (1994) ("[O]n average, women . . . do more housework than men, but the gender gap is higher in married couples than in unmarried cohabiting (opposite-sex) couples or any other living situation. When women live with men, either cohabiting or in marriage, they increase their time spent doing 'female-typed' tasks—meal preparation and clean up, housecleaning, laundry, and shopping—with married women increasing their hours more than cohabiting women.")).

<sup>28</sup>Today, prenuptial agreements generally are designed to protect the husband's assets rather than the wife's. For example, a survey of the 39 reported divorce cases of 1992 that involved a challenge to a prenuptial agreement revealed that in 33 of those cases it was the wife who brought the challenge. Barbara A. Atwood, *Ten Years Later: Lingering Concerns About the Uniform Premarital Agreement Act*, 19 J. LEGIS. 127, 154 n.29 (1993). That is, it was the wife rather than the husband who found the agreement to be less generous than the state's equitable distribution regime. Another writer, some twenty years earlier, stated that cases in which the spouse challenging a prenuptial agreement is the husband rather than the wife "are practically nonexistent." Charles W. Gamble, *The Antenuptial Contract*, 26 U.



the sixteenth century, a time when husband and wife were considered one person (the husband), “[d]aughters of noble and wealthy European families, and later daughters of well-to-do American families, entered into premarital agreements to insure that if they died without children, their blood relatives rather than their husbands would inherit their wealth.”<sup>29</sup> Today, however, the focus generally is on divorce, and the contracts generally are instituted not by a prospective spouse's family but by the prospective spouse himself.

Prospective spouses enter into prenuptial agreements because they wish, in the event of divorce, to divide their property in a manner different from that prescribed by the state's standard property-apportionment rules. I say “they,” but generally it is “he,”<sup>30</sup> for the primary purpose of most prenuptial agreements is to protect the wealth and earnings of the economically superior prospective spouse from being distributed to the economically weaker prospective spouse in the event of divorce, and the economically superior spouse is usually the male.<sup>31</sup> To understand the nature of the protection afforded by prenuptial agreements, however, one must understand the property-apportionment rules that apply in their absence.

Putting aside the question of child support,<sup>32</sup> a divorcing spouse potentially has two economic entitlements: an outright share of the marital assets, and periodic

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MIAMI L. REV. 692, 724 (1972). Still, examples of challenges by the husband can be found. See *In re Marriage of Higgason*, 516 P.2d 289, 290 (Cal. 1973) (“The parties hereto were married March 2, 1969. At that time, the wife was 73 years old, and the husband was 48. The wife is a woman with substantial assets, whereas the husband at the time of the marriage was a waiter, earning \$2 an hour plus tips, and had little or no means.”); see also *Gould v. Rafaeli*, 822 S.W.2d 494 (Mo. Ct. App. 1991) (involving a marriage between a wealthy widow and an impecunious cabdriver).

<sup>29</sup>Lynn Wintriss, *Waiver of REA Rights in Premarital Agreements*, PROB. & PROP., May-June 1993, at 16. One cannot help wondering what the bride's wealthy family would have done if the happy spouses had mutually rescinded the contract after the wedding.

<sup>30</sup>But see sources cited *supra* note 28 for examples of prenuptial agreements demanded by women.

<sup>31</sup>Brod, *supra* note 7, at 273.

As a class, women earn less than men. . . . Even the most highly paid women . . . suffer from the gender gap in earnings. . . . For example, in medicine and dentistry, women [in 1989] were earning ‘just over half as much as men.’ The average yearly pay for female lawyers was \$61,773 while the average yearly pay for male lawyers was \$92,148. Thus, even a highly compensated woman who marries a similarly situated man is likely to be disadvantaged by a premarital agreement that shelters each spouse's income from the state-mandated income sharing.

*Id.* at 241-42 (footnotes omitted); see also SMITH, *supra* note 12 (reporting that data from 1994 revealed that in only 22.5% of “dual-earner families” did the wife have a higher income than the husband).

<sup>32</sup>Even today, when American courts are willing to enforce the property-apportionment provisions of prenuptial agreements, they generally refuse to enforce prenuptial bargains relating to child support, child custody, or child visitation. See, e.g., *Edwardson v. Edwardson*, 798 S.W.2d 941, 946 (Ky. 1990); *Huck v. Huck*, 734 P.2d 417, 419 (Utah 1986). The Uniform Premarital Agreement Act, which strongly favors enforcement of prenuptial agreements generally, prohibits such agreements from adversely affecting “the right of a child to support.” UNIF. PREMARITAL AGREEMENT ACT, § 3(b), 9C U.L.A. 35, 43 (2001).

maintenance payments (often called alimony) from the other spouse.<sup>33</sup> Except in community property states,<sup>34</sup> the first entitlement is of much more recent vintage than the second.

*A. Apportionment of "Marital Property" Upon Divorce in Common Law Property States*

Originally, at common law, "marital property" *per se* did not exist; divorce courts awarded property solely on the basis of predivorce title.<sup>35</sup> Even as late as 1978, a traditional homemaker "could leave a 40-year marriage with essentially no property, even though her husband had created a valuable business during the marriage, relying in part on her assistance."<sup>36</sup> Indeed, some courts responded with outrage to the suggestion that a wife's nonpecuniary contributions to a husband's business or professional practice should generate property-entitlements on divorce.<sup>37</sup> "He who earns it owns it,"<sup>38</sup> was the prevailing view.

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<sup>33</sup>Although most states have one statutory provision authorizing judicial property-apportionment and another authorizing the award of alimony, in practice the distinction between property claims and alimony claims has begun to blur, Suzanne Reynolds, *The Relationship of Property Division and Alimony: The Division of Property to Address Need*, 56 FORDHAM L. REV. 827, 832-34 (1988), and courts now often base property-apportionment decisions in part on need-related factors (age, health, sources of income) that traditionally and doctrinally were associated only with alimony. *Id.* at 844-45; *see, e.g.*, Weigel v. Weigel, 604 N.W.2d 462 (N.D. 2000). Also responsible for this blurring of conceptual boundaries is the growing prevalence of private settlement agreements concluded by divorcing parties at the time of the divorce. *See* Marygold Shire Melli, Howard S. Erlanger, & Elizabeth Chambliss, *The Process of Negotiation: An Exploratory Investigation in the Context of No-Fault Divorce*, 40 RUTGERS L. REV. 1133, 1143 (1988); Austin Sarat & L.F. Felstiner, *Law and Strategy in the Divorce Lawyer's Office*, 20 L. & SOC'Y REV. 93, 109 (1986). Private agreements often seem to treat "alimony" payments and "property" payments interchangeably or reflect the drafter's awareness that tax benefits may turn on whether a payment is characterized as alimony or property. In the interests of clarity, however, I shall adhere in this article to the traditional approach and accord separate treatment to property awards and alimony awards.

<sup>34</sup>Nine states apply community property principles to the regulation of marital property: Arizona, California, Idaho, Louisiana, New Mexico, Nevada, Texas, Washington, and Wisconsin. Wisconsin is not a community property state by tradition, like the other eight; but when it adopted the UNIFORM MARITAL PROPERTY ACT, 9A U.L.A. 103 (1998), the first (and so far the only) state to do so, it thereby joined the community property ranks, inasmuch as the property-apportionment regime under the UMPA is essentially a community property regime. *See* William Reppy, *The Uniform Marital Property Act: Some Suggested Revisions for a Basically Sound Act*, 21 HOUS. L. REV. 679, 683 (1984).

<sup>35</sup>LAWRENCE J. GOLDEN, *EQUITABLE DISTRIBUTION OF PROPERTY* 1-2 (1983).

<sup>36</sup>AM. L. INST., *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS* [hereinafter ALI PRINCIPLES] § 4.02, reporter's notes cmt. a (2000) (citing *Saff v. Saff*, 402 N.Y.S.2d 690, 693 (S. Ct. App. Div. 1978), *appeal dismissed*, 389 N.E.2d 142 (N.Y. 1979).

<sup>37</sup>*See* JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* 117 (2000) (citing *DeWitt v. DeWitt*, 296 N.W.2d 761, 767 (Wis. Ct. App. 1980). In *DeWitt*, the court reasoned that awarding entitlements to a wife on such a basis "treats the parties as though they were strictly business partners, one of whom has made a calculated investment in the commodity of the other's professional training, expecting a dollar

Still, there were stirrings on the other side of the issue. In 1963, for example, an official report to the President's Commission on the Status of Women made the following recommendation:

Marriage as a partnership in which each spouse makes a different but equally important contribution is increasingly recognized as a reality . . . . During marriage, each spouse should have a legally defined and substantial right in the earnings of the other [spouse], in the real and personal property acquired through those earnings, and in their management. Such a right should be legally recognized as surviving the marriage in the event of its termination by divorce, annulment, or death.<sup>39</sup>

While common law property states have remained unwilling to implement such shared-ownership principles *during a marriage's existence*, they became willing over the years, as evidence accumulated as to the injustice of the old he-who-earns-it-owns-it rule,<sup>40</sup> to apply these principles on *divorce*. By the mid-1980s, all common law property states had adopted by statute some sort of "equitable distribution" regime, whereby divorce courts were authorized to assign property to one spouse or the other without regard to predivorce legal ownership or the source of the earnings used to acquire it.<sup>41</sup>

The equitable distribution statutes adopted in common law property states generally borrow from community property law the distinction between property that "belongs" in some sense to the couple *qua* couple (marital property), and property that belongs to only one of the spouses individually (separate property).<sup>42</sup> Of course, the details of the categorization standards vary considerably from state to state. If a business that one spouse owned before marriage (and is therefore separate property) appreciates during the marriage, some states treat the entire appreciation as marital

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for dollar return." *Id.* The court further noted that most "marital planning" is not "so coldly undertaken." *Id.* See also *Hoak v. Hoak*, 370 S.E.2d 473, 478 (W. Va. 1988) ("Marriage is not a business arrangement, and this Court would be loath to promote any more tallying of respective debits and credits than already occurs in the average household.").

<sup>38</sup> Williams, *supra* note 37, at 121.

<sup>39</sup>PRESIDENT'S COMM'N ON THE STATUS OF WOMEN, AMERICAN WOMEN: REPORT OF THE PRESIDENT'S COMM'N ON THE STATUS OF WOMEN 47 (1963).

<sup>40</sup>One of the most glaringly unjust applications of the old understanding was *Fischer v. Wirth*, 326 N.Y.S.2d 308 (App. Div. 1971), a case in which the wife had "used her earnings for family expenses while the husband [had] used his earnings to accumulate real and personal property in his name only. The court found that the wife had no equitable claim on this property." *Id.* at 310-11; see also Reynolds, *supra* note 33, at 836 n.44.

<sup>41</sup>ALI PRINCIPLES, *supra* note 36, § 4.02, reporter's notes cmt. a; GRACE G. BLUMBERG, COMMUNITY PROPERTY IN CALIFORNIA 4 (2d ed. 1993). For example, in *Weigel v. Weigel*, 604 N.W.2d 462 (N.D. 2000), the court regarded the house where the couple had resided as marital property subject to equitable—indeed, 50/50—distribution, even though the husband had provided the entire down payment from his own separate property. *Accord* *Mann v. Mann*, 979 P.2d 497 (Wyo. 1999).

<sup>42</sup>Community property states use the term community property" where common law property states would use "marital property." Both systems use the term "separate property" identically.

property,<sup>43</sup> while others treat as marital property only that portion of the appreciation attributable to the use of other marital property or to the personal efforts of either spouse (as distinguished, say, from appreciation attributable to inflation or other market conditions beyond the influence of either spouse).<sup>44</sup> Some states hold that a spouse's professional degree is marital property,<sup>45</sup> while others (a greater number) hold that it is not.<sup>46</sup> But once the categorization is made, states largely agree as to the consequences: Marital property is subject to equitable distribution; separate property is not.<sup>47</sup>

Of course, the mere identification and valuation of those assets that are considered "marital" does not entirely dispose of the property-division problem. Equitable distribution must be "equitable," and again, state standards vary widely. Trial courts must consider many factors—generally statutory factors—in deciding upon a plan of distribution, but most of these factors relate in some way or another to two considerations: the need of each party and the contribution of each party.<sup>48</sup> A

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<sup>43</sup>23 PA. CONS. STAT. ANN. § 3501(a) (2001); *Anthony v. Anthony*, 514 A.2d 91 (Pa. Super. 1986).

<sup>44</sup>VA. CODE ANN. § 20-107.3.A.3.a (West 2001).

<sup>45</sup>*E.g.*, *Daniels v. Daniels*, 418 N.W.2d 924, 927 (Mich. Ct. App. 1988); *O'Brien v. O'Brien*, 489 N.E.2d 712, 713 (N.Y. 1985).

<sup>46</sup>*E.g.*, *In re Marriage of McVey*, 641 P.2d 300 (Colo. Ct. App. 1981); *In re Marriage of McManama*, 399 N.E.2d 371 (Ind. 1980); *Hubbard v. Hubbard*, 603 P.2d 747 (Okla. 1979).

<sup>47</sup>Not all common-law property states explicitly differentiate between marital property and separate property. A few states purport to render vulnerable to equitable distribution *all* property owned by either or both spouses. *See, e.g.*, IND. CODE ANN. § 31-15-7-4(b) (West. 1999) ("The court shall divide the property of the parties, whether: (1) owned by either spouse before the marriage; (2) acquired by either spouse in his or her own right [during the marriage]; or (3) acquired by their joint efforts, in a just and reasonable manner."); VT. STAT. ANN. tit. 15, § 751(a) (2002). But these so-called "one pot" or "all property" jurisdictions (as opposed to the "dual property" jurisdictions discussed in the text) direct their courts, in determining a just and reasonable division of a couple's assets, to consider factors that are traditionally used in dual property states to distinguish separate property from marital. *See, e.g.*, IND. CODE ANN. § 31-15-7-5(1) (West 1999) ("[t]he contribution of each spouse to the acquisition of the property."); VT. STAT. ANN. tit. 15, § 751(b)(11) (2002) ("[t]he contribution of each spouse in the acquisition, preservation, and depreciation or appreciation in value of the respective [assets], including the nonmonetary contribution of a spouse as a homemaker.").

The American Law Institute recommends a "dual property" system. ALI PRINCIPLES, *supra* note 36, §§ 4.09, 4.11.

<sup>48</sup>ALI PRINCIPLES, *supra* note 36, § 4.09 cmt. a. To some extent, "need" and "contribution" represent a conflicting vision of the nature of marriage: "need" suggests a dependency model, while "contribution" suggests a partnership model. For a discussion of the tensions caused by this conflict, see Martha Albertson Fineman, *Societal Factors Affecting the Legal Rules for Distribution of Property*, in *AT THE BOUNDARIES OF LAW: FEMINISM AND LEGAL THEORY* 265, 271-78 (Martha Albertson Fineman & Nancy Sweet Thomadsen eds. 1991) ("The third most commonly listed factor [in a comprehensive survey, after 'need' and 'contribution'] was the length of the marriage, which can be relevant only as an influence on the application of the primary factors of contribution (which perhaps lessens in importance with increasing duration) and need (which perhaps increases in importance with increasing duration)."). In many states, marital fault bears upon equitable distribution. *See, e.g.*, *Ex Parte O'Daniel*, 515 So. 2d 1250 (Ala. 1987); *Davis v. Davis*, 458 N.W.2d 309 (N.D. 1990). A

small number of states, by statute, presume that equitableness requires a 50/50 split between the spouses, or at least treat 50/50 as “the starting point” for any determination,<sup>49</sup> but courts in those states must nonetheless weigh the same “need” and “contribution” factors to determine whether a claimant has successfully rebutted the presumption or justified a departure from the starting point.

*B. Apportionment of Property Upon Divorce in Community Property States*

The community property system operating in nine American states

is based on a sharing or partnership theory of marriage, which presumes that each spouse contributes equally, in a direct or indirect manner, to the accumulation of assets during the marriage. . . . [T]he system, in general, regards most property acquired through the efforts of [either or] both spouses as community property. [Treated as separate property are] assets that a spouse acquired prior to marriage [as well as assets acquired] by individual gift or inheritance during marriage.<sup>50</sup>

Thus, for example, any wages that either spouse receives for services performed during marriage are regarded as community property. And when a marriage is terminated by divorce, each spouse may keep his separate property and is also entitled to take with him his one-half share—outright, not an undivided share—of the accumulated community property, although most community property states have, in fact, modified the traditional 50/50 rule by enacting equitable distribution statutes.<sup>51</sup> (Any departure from strict 50/50 distribution of community property necessarily awards to one spouse a portion of the other spouse’s separate property.)

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majority of states, however, reject fault as a distribution factor. *See, e.g.*, *Horst v. Horst*, 623 P.2d 1265, 1270-71 (Haw. Ct. App. 1981); *Kanta v. Kanta*, 479 N.W.2d 505, 508 (S.D. 1991); TENN. CODE ANN. § 36-4-121 (2004). *See generally* ALI PRINCIPLES, *supra* note 36, at ch. 1, Topic 2, reporter’s notes. But a jurisdiction that rejects fault, in the sense of adultery or cruelty, as a factor to be weighed in making equitable distribution may nonetheless treat *financial* misconduct—e.g., dissipation of marital property by means of gifts to a paramour—as a distribution factor. *See* ALI PRINCIPLES, *supra* note 36, at § 4.10.

<sup>49</sup>*E.g.*, ARK. CODE ANN. § 9-12-315 (2003); IND. CODE ANN. § 31-15-7-5 (West 1999); N.C. GEN. STAT. ANN. § 50-20(c) (West Supp. 2003). The American Law Institute likewise recommends this approach. ALI PRINCIPLES, note 36 *supra*, at § 4.09(1).

<sup>50</sup>JOHN DE WITT GREGORY ET AL., UNDERSTANDING FAMILY LAW 72-73 (2d ed. 2001). Unlike the common law property system, the community property system gives each spouse marriage-based property entitlements during the marriage, not merely upon death or dissolution. For example, neither spouse may validly convey or encumber community real property without the written consent of the other spouse. *E.g.*, IDAHO CODE ANN. § 32-912 (1996).

<sup>51</sup>*See, e.g.*, WASH. REV. CODE ANN. § 26.09.080 (West 1997). *See supra* text accompanying notes 48-49.

C. Alimony<sup>52</sup> Awards in Common Law Property and Community Property States

It goes by many names—alimony, spousal support, spousal maintenance—but its essence is universally understood: an obligation judicially imposed on one spouse to continue contributing to the other spouse's support even after their marriage is over.<sup>53</sup> While courts in almost all American jurisdictions do indeed enforce such an extended obligation,<sup>54</sup> they disagree as to its moral or doctrinal foundation.<sup>55</sup> Some courts, particularly in cases involving long-term marriages, regard alimony as a tool for allowing the less wealthy spouse to continue to enjoy after divorce the lifestyle she had enjoyed during the marriage. In *Rosenberg v. Rosenberg*, for example, a wife who had been assigned almost \$6 million of property in equitable distribution was held entitled to an alimony award of \$2,000 per week in addition: “[T]he central objective of alimony is, subject to the availability of resources, maintenance of the more dependent spouse in an economic style close to which the spouse had become accustomed during the marriage.”<sup>56</sup> Other courts treat alimony as a form of recompense for the more dependent spouse's nonmonetary contributions to the

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<sup>52</sup>Courts sometimes make awards of alimony *pendente lite*: temporary awards to meet one spouse's living expenses during the pendency of the divorce proceedings. See GREGORY, ET AL., *supra* note 50, at 297-98. We shall not be discussing such awards on this occasion. Rather, we shall be concerned only with awards of so-called “permanent alimony,” which may or may not actually *be* permanent but which nonetheless are intended to last for an extended time.

<sup>53</sup>Although alimony generally consists of a series of periodic payments, many states authorize courts to make “lump sum” alimony awards as well. See, e.g., *Winokur v. Winokur*, 365 S.E.2d 94 (Ga. 1988); *Washburn v. Washburn*, 677 P.2d 152 (Wash. 1984). Lump sum awards may be particularly desirable where the divorce is acrimonious and the dependent spouse is loath to rely on the other spouse's steady compliance. See, e.g., *In re Marriage of Goodwin*, 606 N.W.2d 315 (Iowa 2000).

<sup>54</sup>Ira Mark Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1, 4 (1989). The popular media often portray alimony as a routine outcome in divorce, available to any woman who asks for it. Lenore J. Weitzman & Ruth B. Dixon, *The Alimony Myth: Does No-Fault Divorce Make a Difference?*, 14 FAM. L.Q. 141, 142-43 (1980). In fact, however, alimony awards, though hardly rare, are more the exception than the rule; somewhere between 15 and 25% of divorced women get them. See ALI PRINCIPLES, *supra* note 36, § 5.04, reporter's notes, cmt. a, and the sources cited therein. Some studies have suggested even lower figures. See Reynolds, *supra* note 33 at 843 n.79; see also Jeffrey Evans Stake, *Mandatory Planning for Divorce*, 45 VAND. L. REV. 397, 401 (1992).

<sup>55</sup>For example, the Supreme Court of New Hampshire held it proper for a trial court to award alimony as a substitute for the equitable distribution of property. *In re Jones*, 768 A.2d 1042 (N.H. 2001). The plaintiff was entitled, under the state's principles of equitable distribution, to one-half of the defendant's business, but the trial court awarded the entire business to defendant in order to avoid future conflicts between the parties. And then to compensate the plaintiff for this unequal division of marital property, it awarded her additional alimony; indeed, more alimony than she had asked for. *Id.* at 1045-46. In Illinois, on the other hand, “an award of maintenance in lieu of property is improper” (though an award of property in lieu maintenance *is* proper). *In re Marriage of Brackett*, 722 N.E.2d 287, 295 (Ill. App. Ct. 1999).

<sup>56</sup>595 N.E.2d 792, 793 (Mass. App. Ct. 1992); accord *Heim v. Heim*, 763 P.2d 678, 683 (Nev. 1988).

family.<sup>57</sup> And still others employ alimony as a transitional, rehabilitative tool designed to maintain the more dependent spouse until he or she can become self-supporting.<sup>58</sup> Variation among courts also exists as to the significance of marital fault in the determination of alimony awards.<sup>59</sup>

The American Law Institute, which rejects fault as a factor in alimony determinations,<sup>60</sup> regards as the doctrinal foundation for alimony awards the equitable allocation, between the spouses, of the “financial losses that arise at the dissolution of [the] marriage.”<sup>61</sup> Among the financial losses that the Institute enumerates, however, are losses that would sound quite familiar to divorce courts already: e.g., “the loss [in a marriage of significant duration] in living standard experienced at dissolution by the spouse who has less wealth or earning capacity”<sup>62</sup> and “[t]he loss either spouse incurs when the marriage is dissolved before that spouse realizes a fair return from his or her investment in the other spouse’s earning capacity.”<sup>63</sup>

#### *D. The Incentives Behind Prenuptial Agreements*

Prenuptial agreements are prevalent and fashionable and likely to become even more so. While statistics in this particular context are necessarily conjectural,<sup>64</sup> one author writing in the mid-1990s reported that approximately 5% of married couples (some 50,000 couples) each year execute prenuptial agreements, up from only 1% in the mid-1970s.<sup>65</sup> Of course, one obvious explanation for this five-fold increase is that prenuptial agreements were more regularly enforced in the 1990s than in the 1970s. But this change in the enforceability rate can serve as only a partial explanation; parties with greater bargaining power frequently insert provisions in a contract that they know are unenforceable in the hope that the weaker party, ignorant of the law and more easily intimidated, will nonetheless presume she is bound by them. We must look elsewhere for explanations.

The American divorce rate is high,<sup>66</sup> and so is popular awareness of that high rate. The news media constantly remind us of the dispiriting fact that 50% of all

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<sup>57</sup>See, e.g., *McNamara v. McNamara*, 443 N.W.2d 511, 516 (Mich. Ct. App. 1989); *Klein v. Klein*, 555 A.2d 382, 387 (Vt. 1988).

<sup>58</sup>See *Hopfer v. Hopfer*, 757 A.2d 673 (Conn. App. Ct. 2000); *Pfohl v. Pfohl*, 345 So. 2d 371 (Fla. Dist. Ct. App. 1977). See generally GREGORY ET AL., *supra* note 50, at 299-301.

<sup>59</sup>See ALI PRINCIPLES, *supra* note 36, at ch. 1, topic 2, reporter’s notes.

<sup>60</sup>*Id.* § 5.02(2).

<sup>61</sup>*Id.* § 5.02(1).

<sup>62</sup>*Id.* § 5.03(2)(a).

<sup>63</sup>*Id.* § 5.03(3)(a).

<sup>64</sup>See Bix, *supra* note 5, at 160. “[E]mpirical work on attitudes and practices [relating to prenuptial agreements] is fairly sparse.” *Id.*

<sup>65</sup>See Gary Belsky, *Living by the Rules*, MONEY, May 1996, at 102.

<sup>66</sup>Indeed, they are the highest in the industrialized world. Hodder, *supra* note 9, at 42.

American marriages end in divorce.<sup>67</sup> Indeed, based on current data, “25-year-olds marrying for the first time . . . face a 52.5 percent chance overall that their marriage will end in divorce.”<sup>68</sup> In 1972, only 17% of American adults who had ever been married had once (or more often) gone through a divorce; by 1998, that figure had risen to 33%.<sup>69</sup> Obviously, high divorce rates and widespread awareness of divorce generate greater interest, especially among persons of wealth, in minimizing divorce’s adverse financial consequences. Even if the enforceability of prenuptial agreements were less certain than it is today, the high incidence of divorce would still convince matrimonial attorneys of the agreements’ desirability: “If I were to tell you that there’s a disease out there that affects 50% of the body politic and that there’s a vaccine that is only 60% effective, of course you would still take the vaccine.”<sup>70</sup>

High divorce rates mean high second-marriage rates, and the divorce rate for second marriages is even higher than for first marriages: 60% instead of 50%.<sup>71</sup> It should come as no surprise, then, that prenuptial agreements are more common for second marriages than for first marriages.<sup>72</sup> And they are more common not only because of the higher divorce rate but also because second marriages occur at a later chronological age than first marriages: that is, at an age when one or both spouses are likely to have accumulated more premarital wealth in need of protection.<sup>73</sup> Indeed, inasmuch as Americans postpone even their first marriages to a later (and

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<sup>67</sup> “[T]he cold fact is that approximately one in every two marriages in the United States will end in divorce.” Bix, *supra* note 5, at 194 (citing Lynn A. Baker, *Promulgating the Marriage Contract*, 23 MICH. J.L. REFORM 217, 226 & n.34, 245 & n. 101 (1990)); *see also* Stake, *supra* note 54, at 398 n.4 (“Based on the marriages within the last 15 years, the odds of divorce are about one out of two.”). For some recent rethinking of these data, see Dan Hurley, *Divorce Rate: It’s Not as High as You Think*, N.Y. TIMES, Apr. 19, 2005, at D7.

<sup>68</sup> Hodder, *supra* note 9, at 42. “About 50 percent of first marriages for men under age forty-five may end in divorce, and between 44 and 52 percent [of first marriages for women under age forty-five] may end in divorce . . . .” U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, NUMBER, TIMING, AND DURATION OF MARRIAGES AND DIVORCES: 1996, at 18, available at <http://www.sipp.census.gov/sipp/p70s/p70-80.pdf>.

<sup>69</sup> SMITH, *supra* note 12, at 22.

<sup>70</sup> William G. Flanagan & David Stix, *Share and Share Unalike*, FORBES, June 10, 1991, at 116, 118 (quoting matrimonial lawyer Raoul Felder).

<sup>71</sup> Ilyce R. Glink, *Nuptial Saga: “48 Hours of Marriage, For Better For Worse,”* CHI. TRIB., May 19, 1991, § 6 (Womanews), at 2.

<sup>72</sup> See Allison A. Marston, Note, *Planning for Love: The Politics of Prenuptial Agreements*, 49 STAN. L. REV. 887, 891 (1997) (citing Allison A. Page, Note, *Premarital Consent to Waiver of Spousal Pension Benefits: A Proposal to Equalize Prenuptial “I Do” and Postnuptial “I Do,”* 47 WASH. U.J. URB. & CONTEMP. L. 157, 162 (1995) (“[A]n estimated 20 percent of remarriages feature a prenuptial agreement.”)).

<sup>73</sup> Researchers have found that if one or both spouses have been married before, their marriage is more likely to be “age-discrepant” than if the marriage were the first for each. Brod, *supra* note 7, at 244. The older and more economically powerful member of an age-discrepant couple is likely to be particularly anxious to insulate property from marital claims.



presumably wealthier) age than before, prenuptial agreements are becoming more popular for first-timers as well.<sup>74</sup>

Shifts in judicial preferences also account for the increasing popularity of prenuptial agreements. The 1960s marked the beginning of a judicial trend away from grants of alimony in favor of grants of property.

The ethos of increased independence for persons wanting to be free of their spouse, the elimination of fault as a legally relevant consideration in divorce, the excision of permanence from the concept of marriage, the granting of freedom to remarry, and the replacement of assumed female dependency with assumptions of equality and autonomy may have discouraged already reluctant judges from granting alimony.<sup>75</sup>

And property awards have one important characteristic that alimony awards do not, a characteristic that reformers considered a blessing but that economically dominant spouses consider a bane: immutability. Alimony awards, even if they are classified as "permanent alimony," are always subject to modification in the event of post-adjudication changes in circumstances,<sup>76</sup> whereas outright awards of property are not subject to such modification.<sup>77</sup> Consequently, the shift from alimony to property awards creates an added incentive for the wealthier spouse to insist on a prenuptial agreement.

The widespread publicity accorded large marital awards in high-profile divorces also helps to explain the increasing appeal of prenuptial agreements.<sup>78</sup> When Jack Welch, retired CEO of General Electric, divorced his wife Jane after his much-publicized affair with the editor of Harvard Business Review, his net worth was about \$900 million, and Jane, there being no enforceable prenuptial agreement in place, received \$500 million of it in the divorce settlement.<sup>79</sup> NASCAR driver Jeff Gordon divorced his wife after seven years of marriage, and she received as a consequence some \$17 million of his \$50 million net worth.<sup>80</sup>

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<sup>74</sup>In 2000, the median age of men at the time of their first marriage was 26.8, up from 24.7 in 1980 and 22.8 in 1960. For women, the 2000 figure was 25.1, up from 22.0 in 1980 and 20.3 in 1960. WORLD ALMANAC EDUC. GROUP, WORLD ALMANAC AND BOOK OF FACTS 2003, at 77 (2003); see Symposium, *Developments in the Law—The Law of Marriage and Family*, 116 HARV. L. REV. 1996, 2075 (2003) [hereinafter *Developments*].

<sup>75</sup>Stake, *supra* note 54, at 401.

<sup>76</sup>GREGORY ET AL., *supra* note 50, at 304-12.

<sup>77</sup>*But see* Reynolds, *supra* note 33, at 834 n.34 (citing two New York cases in which courts suggested that their equitable distribution awards might be subject to future modification).

<sup>78</sup>*See Developments*, *supra* note 74, at 2075 n.7.

<sup>79</sup>Braden Keil, *A Beacon for Welch*, N.Y. POST, July 3, 2004, at NaN; see also Margaret Littman, *Is a Prenup Expiration Date an Ex-Wife's Best Revenge?*, CHI. TRIB., March 27, 2002, at C1 (noting that the couple originally had signed a prenuptial agreement, but by the agreement's own terms it had expired ten years after they were married, and that tenth anniversary occurred thirteen years before the divorce).

<sup>80</sup>Ed Hinton, *Gordon's Engine Purring, With Personal Problems Behind Him*, NASCAR'S Wonder Boy Re-Emerges as a Dominant Driver, CHI. TRIB., July 11, 2004, at C13; Don

Also well-publicized at this time were the enormous savings that premarital agreements generated for wealthy spouses. Professional baseball star Barry Bonds was able, because of a prenuptial agreement, to walk away from a six-year marriage (during which his annual income had increased some 75-fold) obliged to pay merely \$20,000 per month in child support and \$10,000 per month in alimony for about four and a half years, instead of having to allot half of his \$40 million fortune to his ex-wife.<sup>81</sup> And a prenuptial agreement allowed Boston construction magnate M. Joseph DeMatteo to keep 99% of his \$112 million net worth upon divorce.<sup>82</sup>

### III. THE EVOLUTION IN THE ENFORCEABILITY OF PRENUPTIAL AGREEMENTS

In less than 30 years, American courts shifted from routinely rejecting divorce-focused prenuptial agreements to routinely enforcing them.<sup>83</sup> Before the 1970s, American courts refused enforcement, on the ground that enforcement would tend to undermine marital stability.<sup>84</sup> This belief that prenuptial agreements promote divorce may strike us today as quaintly Victorian, but to me it is naive to believe otherwise. Of course they promote divorce. If a married man knows that a divorce will cost him half his net worth, he will be less inclined to walk away from the marriage than if he knows that a premarital contract will keep those costs to a minimum.<sup>85</sup> And even apart from these financial considerations, prenuptial agreements may be said to promote divorce by making the unthinkable thinkable:

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Coble, *Lovers' Lane, It's Not. Still, Many Drivers Race into Romance*, FLA. TIMES-UNION, Feb. 14, 2004, at C1.

<sup>81</sup>In re Marriage of Bonds, 5 P.3d 815 (Cal. 2000); *National League*, DALLAS MORNING NEWS, Aug. 27, 2000, at 24B; *Pro Basketball: No Big Deal for Four Teams*, COLUMBUS DISPATCH (OHIO), Aug. 22, 2000, at 2F.

<sup>82</sup>DeMatteo v. DeMatteo, 762 N.E.2d 797 (Mass. 2002); Bruce Mohl, *On To-Do Lists: Rehearsal for Divorce Many Advise Prenups While Love Is in the Air*, BOSTON GLOBE, Sept. 21, 2003, at H6; Kathleen Burge, *SJC Upholds Validity of Prenuptial Agreement*, BOSTON GLOBE, Feb. 9, 2002, at A1.

<sup>83</sup>Bernstein, *supra* note 17, at 138 (citing Pendleton v. Fireman, 5 P.3d 839, 845-46 (Cal. 2000)).

<sup>84</sup>E.g., Gallemore v. Gallemore, 114 So. 371 (Fla. 1927); Scherba v. Scherba, 65 N.W.2d 758 (Mich. 1954); Fricke v. Fricke, 42 N.W.2d 500 (Wis. 1950).

<sup>85</sup>See Fincham v. Fincham, 165 P.2d 209, 213 (Kan. 1946) ("Did the provision for settlement, in case of separation, invite and encourage a separation as a source of pecuniary profit to the husband? Manifestly it did. The result is that quite naturally he might be inclined to be less considerate of his marital duties and obligations. He might even become grossly abusive, completely intolerable and deliberately bring about a separation in the contractual assurance that irrespective of the cause of separation he could effectively relieve himself of all marital and contractual obligations by the payment of \$2,000, a rather insignificant sum in comparison with his financial worth of approximately \$160,000."); see also Carlin Flora, *Let's Make a Deal: Does a Prenuptial Agreement Sow the Seeds of Divorce or Provide a Crash Course in Conflict Resolution?*, 37 PSYCH. TODAY, Nov. 1, 2004, at 54 (quoting attorney Sam Margulies: "Without a prenup, the stronger party has got to engage in more compromise in the course of the marriage. But with a prenup, he can just say, 'Honey, if you don't like it - leave.'"); John F. Schaefer, *Why Michigan Should Divorce Antenuptial Agreements from Divorce Cases*, 76 MICH. BUS. L.J. 1076, 1076 (1997).

[O]ne criterion of being in love is the belief that it—both the feeling and the relationship underlying it—will go on forever. If one thinks that it will end in a few weeks—or even a few years—then one is not in love. At the same time, the cold fact is that approximately one in every two marriages in the United States will end in divorce. These facts sit uneasily together; people know divorce is not rare, but keeping a pragmatic eye on things—here, on the likelihood of failure—seems just the type of attitude that may make failure more likely.<sup>86</sup>

Yet the earliest American courts to *enforce* divorce-focused prenuptial agreements still felt compelled to include in their opinions the fruitless caveat that a prenuptial agreement would not be enforced if the particular agreement could be shown to have facilitated or promoted the particular divorce.<sup>87</sup> The inclusion of this caveat demonstrates that the shift in judicial attitudes from treating prenuptial agreements as unenforceable *per se* to treating them as presumptively enforceable reflected not a change of opinion as to whether prenuptial agreements encourage divorce, but rather a change of opinion as to the *nature* of divorce and marriage.

Back when prenuptial agreements were unenforceable, marriage was regarded as a state-regulated public status: not a bilateral alliance, but a trilateral one involving the two spouses *and* the state.<sup>88</sup> The state's interest lay in preserving the institution of marriage and in maintaining the financial security of divorced persons.<sup>89</sup> And because the state was a party to every marriage, it could conceivably assert interests in conflict with those asserted by the two spouses. "Since marriage is of vital interest to society and the state, it has frequently been said that in every divorce suit the state is a third party whose interests take precedence over the private interests of the spouses."<sup>90</sup> In other words, a court could not grant a divorce merely because the spouses wanted one;<sup>91</sup> the state had to be agreeable as well.

When the contracting parties have entered into the married state, they have not so much entered into a contract as into a new relation, the rights, duties and obligations of which rest, not upon their agreement, but upon the general law of the State, statutory or common, which defines and prescribes those rights, duties and obligations. They are of law, not of

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<sup>86</sup> Bix, *supra* note 5, at 194-95 (footnotes omitted).

<sup>87</sup> *In re Marriage of Dawley*, 551 P.2d 323, 333 (Cal. 1976); *Posner v. Posner*, 233 So. 2d 381, 385 (Fla. 1970), *rev'd on other grounds*, 257 So. 2d 530 (Fla. 1972).

<sup>88</sup> *See, e.g., Roberts v. Roberts*, 185 P.2d 381, 385 (Cal. Ct. App. 1947); *Anonymous v. Anonymous*, 62 N.Y.S.2d 130, 133 (Sup. Ct. 1946).

<sup>89</sup> *Brooks v. Brooks*, 733 P.2d 1044, 1048 (Alaska 1987). Of special concern was the possibility that the poorer of the two spouses, typically the wife, would, in the absence of an adequate divorce settlement, have to be supported by the state.

<sup>90</sup> *Posner*, 233 So. 2d at 383; *accord Winans v. Winans*, 26 N.E. 293, 295 (N.Y. 1891) ("A divorce suit, while on its face a mere controversy between private parties of record, is as truly viewed, a triangular proceeding *sui generis*, wherein the public or government occupies, in effect, the position of third party. And while this third party is not specially represented by counsel, it is for this purpose to be represented and protected by the judges.").

<sup>91</sup> *Underwood v. Underwood*, 12 Fla. 434, 443 (1868).

contract. It was of contract that the relation should be established, but, being established, the power of the parties, as to their extent or duration, is at an end. Their rights under it are determined by the will of the sovereign as evidenced by law. . . . It is a relation for life; and the parties cannot terminate it at any shorter period by virtue of any contract they may make.<sup>92</sup>

And similarly, a prenuptial contract between prospective spouses could not be allowed to alter the state's rules for property-apportionment inasmuch as the state was not a party to the prenuptial contract. Thus, the judicial shift from rejecting prenuptial agreements to enforcing them was profoundly linked to the public shift from fault-based divorce to no-fault divorce.<sup>93</sup> Indeed the decade that marked the so-called no-fault revolution, the 1970s, also marked the beginning of the prenuptial agreement revolution.

Two developments spurred the no-fault revolution. The first was the mounting dissatisfaction with, even revulsion at, the collusive and migratory games that the fault-based system forced upon spouses intent on divorce. In the days when divorce statutes required marital "fault" like adultery, desertion, or physical or mental cruelty,<sup>94</sup> and only the "innocent" spouse had standing to commence a divorce action,<sup>95</sup> couples who shared a desire for divorce but could provide no genuine evidence of statutory misconduct would manufacture whatever evidence was required.<sup>96</sup> Indeed, the State of New York, which once allowed divorce *only* for adultery,<sup>97</sup> was notorious for granting divorces on the basis of obviously staged

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<sup>92</sup>Adams v. Palmer, 51 Me. 480, 483 (1863).

<sup>93</sup>See, e.g., McAlpine v. McAlpine, 679 So. 2d 85, 93 (La. 1996).

[W]ith the advent of no-fault divorce and the changes in society that such laws represent, public policy has changed[,] and the traditional rule that prenuptial waivers of permanent alimony were void ab initio has given way to the more realistic view that such agreements are valid and enforceable under certain conditions.

Id. at 93.

<sup>94</sup>These statutory fault grounds were often interpreted quite strictly. For example, a New Jersey court held that sexual conduct with a third party did not amount to adultery unless the sexual conduct included coitus. *W. v. W.*, 226 A.2d 860, 862 (N.J. Super. Ct. Ch. Div. 1967); see also Laura Bradford, Note, *The Counterrevolution: A Critique of Recent Proposals to Reform No-Fault Divorce*, 49 STAN. L. REV. 607, 610 (1997).

<sup>95</sup>See Adriaen M. Morse, Jr., Comment, *Fault: A Viable Means of Re-Injecting Responsibility in Marital Relations*, 30 U. RICH. L. REV. 605, 607 (1996).

<sup>96</sup>See, e.g., Symposium, *From the Second Sex to the Joint Venture: An Overview of Women's Rights and Family Law in the United States During the Twentieth Century*, 88 CAL. L. REV. 2017, 2051 (2000). So familiar in popular culture were these machinations that Cole Porter could enjoy considerable success with a 1932 musical comedy, *The Gay Divorce*, about a woman embarking on a collusive divorce, a hired correspondent, and a man (played by Fred Astaire) whom she mistakes for the hired correspondent. DAVID EWEN, *NEW COMPLETE BOOK OF THE AMERICAN MUSICAL THEATER* 163-64 (1970).

<sup>97</sup>Indeed, New York is one of the few states that still cling to a fault-only divorce system, although the list of grounds now includes more than just adultery. See Leslie Eaton, *A New Push to Loosen New York's Divorce Law*, N.Y. TIMES, Nov. 30, 2004, at 1.

"discoveries" of one spouse *flagrante delicto* with a third party,<sup>98</sup> and divorce trials in New York at the time rarely lasted even fifteen minutes.<sup>99</sup>

If the couple hadn't the stomach for manufactured melodrama, they might have relied on temporary migration to achieve their goal. The couple needed first to find an obliging state with a short residency requirement as well as a more lenient list of possible grounds for divorce than the state where the couple lived. A judgment of divorce rendered by one state is entitled to Full Faith and Credit by other states only if the forum state had jurisdiction to grant the divorce,<sup>100</sup> but, as a federal constitutional matter, the mere establishment of domicile in the forum state by the plaintiff spouse suffices to confer such jurisdiction.<sup>101</sup> Most states, however, impose by statute an additional jurisdictional requirement beyond that necessary to satisfy the federal "domicile" standard: They require the plaintiff spouse to have resided in the state for a minimum statutory period.<sup>102</sup> Nevada, with its liberal grounds for divorce and its residency requirement of only six weeks,<sup>103</sup> became "the hardy perennial of the quickie-divorce states."<sup>104</sup> But the migratory approach, like the

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<sup>98</sup>See Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9, 16 n.17 (1990); see also Eaton, *supra* note 97. ("Many judges detest the he-said, she-said of fault trials, and some pressure the couple into agreeing to 'constructive abandonment,' in which one of the parties testifies that his or her spouse refused to have sex for a year, despite repeated requests, *even if it is not true.*") (emphasis added).

<sup>99</sup>Richard H. Wels, *New York: The Poor Man's Reno*, 35 CORNELL L.Q. 303, 318 (1950); see also Difonzo, *supra* note 2, at 897 ("According to Herma Hill Kay, a leading figure in the no-fault movement, by the 1960s 'it was impossible to make divorce easier in California than it already was.' In typical ten-minute court hearings, ninety-five percent of California divorce complainants recited accounts of their spouses' 'extreme cruelty' destroying their marriage. This statutory requirement could be met by the wife's simple assertion that her husband was 'cold and indifferent,' which caused her to become 'nervous and upset.'") (footnotes omitted).

<sup>100</sup>*Williams v. North Carolina [II]*, 325 U.S. 226, 229 (1945).

<sup>101</sup>*Williams v. North Carolina [I]*, 317 U.S. 287, 298-99 (1942).

<sup>102</sup>See, e.g., *Sosna v. Iowa*, 419 U.S. 393, 395 (1975). The federal Constitution imposes no durational requirement on the establishment of domicile. An individual can make a state her domicile instantly, simply by moving and residing there with the intention of remaining there indefinitely. 15 MOORE'S FEDERAL PRACTICE ¶ 102.34 to .35 (3d ed. 2005).

<sup>103</sup>Ernest G. Lorenzen, *Extraterritorial Divorce - Williams v. North Carolina II*, 54 YALE L.J. 799, 801 (1945). Nevada's six-week rule was so notorious that Lorenz Hart referred to it obliquely in his song lyrics for the 1938 Rodgers and Hart musical comedy *The Boys from Syracuse*, a musical version of Shakespeare's *Comedy of Errors*. In the first act of the show, which takes place in the Greek-controlled city of Syracuse, a dissatisfied wife sings to her husband:

Listen to your lady who speaks.  
This affair has run its course.  
I'll reside in Athens six weeks  
While I get me a divorce.

Richard Rodgers & Lorenz Hart, *The Boys From Syracuse*, available at <http://www.allthelyrics.com>.

<sup>104</sup>Walter Wadlington, *Divorce Without Fault Without Perjury*, 52 VA. L. REV. 32, 38 n.22 (1966).

collusive approach, required a bit of perjury, inasmuch as the Nevada plaintiff, in order to establish the requisite domicile, had to swear that she intended to remain in Nevada indefinitely and had no plans to return to her previous domicile.

That parties were willing to perjure themselves to obtain divorces demonstrates the width of the gap between the norms reflected in the divorce statutes and the prevailing norms of society at large.<sup>105</sup> And herein lay the second development that spurred the no-fault revolution: the marked change in social attitudes towards marriage and divorce.

The “fault” regime, which dominated American divorce law as soon as there *was* any American divorce law, viewed marital relations as being founded on moral duties of permanent fidelity and responsibility; consequently, those marital bonds could be severed only if one spouse so seriously breached his moral obligations to the other as to forfeit any right to demand fulfillment of duty in return.<sup>106</sup> As long as society understood marriage in that way, divorce necessarily stigmatized both parties: one as a dishonorable villain, the other as a pathetic victim. But as society, perhaps with a little help from psychology,<sup>107</sup> came to see marital breakdown as a complex process for which the spouses shared responsibility,<sup>108</sup> any divorce system that stigmatized the participants had to be rejected. And rejected it was.

The no-fault regime emerged when Americans’ traditional regard for individual autonomy and self-realization—and, by extension, contractual freedom—came to color its view of marriage.

[M]arriage has become an “exchange” relationship. Husband and wife are equal, autonomous parties, each pursuing emotional fulfillment through marriage. The relationship is sustained as long as it produces “returns” for each [spouse].<sup>109</sup>

And the spouses themselves, not the state, are in the best position to judge the marriage’s continued ability to generate those “returns.” Indeed, under a no-fault regime, *either* spouse acting alone can bring about a dissolution of the marriage.<sup>110</sup>

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<sup>105</sup>See Scott, *supra* note 98, at 9; see also Bradford, *supra* note 94, at 611 (“In the 1960s, ninety percent of divorces on fault ground were granted without contest.”).

<sup>106</sup>See Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1809 (1985).

<sup>107</sup>See *id.* at 1845-63.

<sup>108</sup>See Scott, *supra* note 98, at 16 (“Under the modern view, the specific behavior that constituted legal fault was usually only a small part of a story of shared responsibility for the failure of the marriage.”).

<sup>109</sup>*Id.* at 21.

<sup>110</sup>See MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW: AMERICAN FAILURES, EUROPEAN CHALLENGES 81 (1987) (“[T]he virtually universal understanding . . . is that the breakdown of a marriage is irretrievable if one spouse says it is.”). A survey of Nebraska district court judges undertaken five years after Nebraska amended its divorce law to become a no-fault state “failed to reveal a single instance [out of some 10,000 divorce cases] in which it could be said with certainty that a divorce which was desired by even one of the spouses was ultimately refused.” Alan H. Frank, John J. Berman, & Stanley F. Mazur-Hart, *No Fault Divorce and the Divorce Rate: The Nebraska Experience—An Interrupted Time Series Analysis and Commentary* 58 NEB. L. REV. 1, 66 (1978).

The State of New Mexico may have begun the no-fault revolution—albeit, quietly—in 1933 by adding the word “incompatibility” to its statutory list of grounds for divorce.<sup>111</sup> But inasmuch as New Mexico retained the traditional fault-based grounds in its amended statute, New Mexico courts sometimes clung to the notion that divorce could not always be grounded on only one spouse’s wish. In *Clark v. Clark*,<sup>112</sup> for example, where a husband sued for divorce on incompatibility grounds and the wife pleaded the husband’s adultery in response, the court held that it would “shock” the conscience to grant the husband’s petition in circumstances that would make the divorce a reward for bad behavior.<sup>113</sup> The no-fault revolution as we know it today did not truly begin until California, in 1969, not only added a no-fault ground (irreconcilable differences) to its list of divorce grounds but also abolished the rest of the list.<sup>114</sup> Some 15 states have followed California’s lead and abolished all fault-based grounds for divorce.<sup>115</sup> Another 32 states, some before 1969 (like New Mexico) and some since, have added a no-fault ground to their list but retained the traditional fault grounds.<sup>116</sup> But even in these 32 states, the cultural change precipitated by California’s repeal of all fault-based grounds became so powerful as to eviscerate the once-prevalent fault grounds. Indeed, “fault-based petitions [were] often resolve[d] into no-fault divorce decrees.”<sup>117</sup>

The state’s role in structuring the economic settlement between divorcing spouses “was premised on the state’s interest in enforcing the terms of the traditional marriage contract.”<sup>118</sup> Consequently, once the no-fault revolution effectively eliminated the state’s power to interfere with a couple’s intention to divorce, it was but a small step to eliminate (or, at least, reduce) the state’s power to interfere with a divorce-bound couple’s premarital settlement of their economic obligations. And, indeed, the case usually cited as the first American case to uphold the enforceability

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<sup>111</sup>1933 N.M. Laws 54; see also James Herbie Difonzo, *Alternatives to Marital Fault: Legislative and Judicial Experiments in Cultural Change*, 34 IDAHO L. REV. 1, 29 (1977).

<sup>112</sup>225 P.2d 147 (N.M. 1950).

<sup>113</sup>*Id.* at 149. The word “reward” is mine, not the court’s.

<sup>114</sup>See Family Law Act of 1969, ch. 1608, § 4506, 1969 Cal. Stat. 3314, 3324 (now codified at CAL. FAM. CODE. § 2310 (West 2004)). “Incurable insanity” is the one remaining alternative ground. The California legislature seems to have enacted no-fault in the hope that family court judges would not simply accept at face value the parties’ claims of irreconcilable differences but rather, now that they were freed from the burden of umpiring a battle, would evaluate the parties’ claims and assist in repairing the broken marriage. See *In re Marriage of McKim*, 493 P.2d 868, 871 (Cal. 1972). As things have turned out, though, courts have accepted the parties’ claims at face value. Writing less than a decade after California adopted the “irreconcilable differences” standard, one scholar noted that not a single divorce petition had since been denied for failure to establish that such differences existed. See RIANE T. EISLER, *DISSOLUTION: NO-FAULT DIVORCE, MARRIAGE, AND THE FUTURE OF WOMEN* 10 (1977).

<sup>115</sup>See Bradford, *supra* note 94, at 614.

<sup>116</sup>See Difonzo, *supra* note 3, at 908 n.180.

<sup>117</sup>*Id.*

<sup>118</sup>Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1474 (1992).

of prenuptial agreements, *Posner v. Posner*,<sup>119</sup> relied in part on the accelerating acceptance of no-fault divorce.<sup>120</sup>

In the post-*Posner* era, some courts have gone quite far in their willingness to enforce prenuptial agreements. One of the most extreme—indeed, notorious—examples of such judicial deference to private contractual aims is the 1990 Pennsylvania case *Simeone v. Simeone*,<sup>121</sup> which treated prenuptial agreements as if they were ordinary business contracts:

[In the absence of actual fraud or duress,] contracting parties are normally bound by their agreements, without regard to whether the terms thereof were read and fully understood and irrespective of whether the agreements embodied reasonable or good bargains . . . . Parties [to a prenuptial agreement] would not have entered such agreements, and, indeed, might not have entered their marriages, if they did not expect their agreements to be strictly enforced.<sup>122</sup>

To apply a less deferential standard in the case of prenuptial agreements, said the court, would be a patronizing throwback to an age when “[p]aternalistic presumptions and protections [sheltered] women from the inferiorities and incapacities which they were perceived as having.”<sup>123</sup>

Most courts today, however, although they willingly enforce prenuptial agreements, recognize that these are *not* ordinary business contracts, but this recognition has nothing to do with a desire to avoid the appearance of condescension to women. Rather, this recognition proceeds from an awareness of the special circumstances surrounding the execution of a prenuptial agreement. First, the parties to a prenuptial agreement do not bargain at arms’ length; “[t]heir relationship is one of mutual confidence and trust which calls for the exercise of good faith, candor and sincerity in all matters bearing upon the proposed agreement.”<sup>124</sup> Second, the parties entering into a prenuptial agreement do so at a time when, through optimism or careless rapture, they expect the agreement never to apply, or at least not to apply until many years in the future, and therefore they cannot capably assess at the time of

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<sup>119</sup>233 So.2d 381 (Fla. 1970), *rev’d on other grounds*, 257 So. 2d 530 (Fla. 1972). As to *Posner*’s status as the first case to depart from the *per se* rule of unenforceability, see *Developments*, *supra* note 73, at 2078; Difonzo, *supra* note 3, at 938.

<sup>120</sup>233 So. 2d at 384; *see also* ALI PRINCIPLES, *supra* note 36, § 7.01 cmt. a (“The nationwide abandonment of traditional fault divorce since the 1970s eliminated [the] absolute barrier to premarital agreements.”).

<sup>121</sup>581 A.2d 162 (Pa. 1990). When the agreement was signed, the prospective husband was a neurosurgeon and the prospective wife an unemployed nurse. The bride was presented with the contract on the eve of the wedding, and she signed it without the benefit of counsel. *Id.* at 163.

<sup>122</sup>*Id.* at 165, 166.

<sup>123</sup>*Id.* at 165.

<sup>124</sup>*Friedlander v. Friedlander*, 494 P.2d 208, 213 (Wash. 1972).



contracting the impact that the contract's terms are likely to have on them when its enforcement is ultimately sought.<sup>125</sup>

But how can courts, in deciding whether to enforce a prenuptial agreement, balance this concern about the peculiarity of premarital bargains against their general regard for contractual autonomy and their desire to allow private individuals to forge relations on their own terms? The traditional method of balance—at least in theory—was for courts to borrow from ordinary contract law the requirements of voluntariness and conscionability but then, as a reflection of “the longstanding belief that parties to be married are in a relationship of trust,”<sup>126</sup> to impose on the parties an additional, extraordinary requirement of disclosure.<sup>127</sup> The Uniform Premarital Agreement Act (UPAA),<sup>128</sup> promulgated in 1983 and now effective in 26 states,<sup>129</sup> tips the balance scales very far in favor of enforcement and does so by simultaneously weakening the disclosure requirement and all but extinguishing the conscionability requirement.

The UPAA borrows from traditional contract law the requirement of voluntariness; under the Act a premarital agreement may not be enforced against a party thereto if she proves that she “did not execute the agreement voluntarily.”<sup>130</sup> But the Act departs from traditional contract law principles by permitting the contract to be enforced even if it is unconscionable, unless the party seeking to avoid enforcement on that ground can also prove that she did not have actual or even constructive knowledge of the other party's property or financial obligations and that she did not expressly waive, in writing, the right to receive such information.<sup>131</sup>

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<sup>125</sup>ALI PRINCIPLES, *supra* note 36, § 7.02 cmt. c. See generally Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211 (1995).

<sup>126</sup>*Developments*, *supra* note 74, at 2081.

<sup>127</sup>“Parties to commercial agreements are not ordinarily bound to make affirmative disclosures of information in their possession that gives them a bargaining advantage, so long as they do not affirmatively misrepresent or conceal the truth.” ALI PRINCIPLES, *supra* note 35, at § 7.04 cmt. g.

<sup>128</sup>UNIF. PREMARITAL AGREEMENT ACT, 9C U.L.A. 35 (2001).

<sup>129</sup>Judith T. Younger, *Antenuptial Agreements*, 28 WM. MITCHELL L. REV. 697, 716-17 (2001).

<sup>130</sup>UNIF. PREMARITAL AGREEMENT ACT § 6(a)(1), 9C U.L.A. 48 (2001). The UPAA does not define “voluntarily,” but presumably evidence of duress or undue influence would undermine any inference of voluntariness. See Dennis I. Belcher & Laura O. Pomeroy, *A Practitioner's Guide for Negotiating, Drafting and Enforcing Premarital Agreements*, 37 REAL PROP. PROB. & TR. J. 1, 11 (2002).

<sup>131</sup>UNIF. PREMARITAL AGREEMENT ACT § 6, 9C U.L.A. 48-49 (2001).

(a)A premarital agreement is not enforceable if the party against whom enforcement is sought proves that:

(2)The agreement was unconscionable when it was executed *and*, before execution of the agreement, that party:

(i) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;

(ii) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and

Thus, as long as a prospective husband fully discloses all his assets or the prospective wife has constructive knowledge of his assets, even an unconscionable prenuptial agreement will be enforced against a wife who voluntarily signs. Furthermore, unconscionability—an issue of law, not of fact<sup>132</sup>—is to be determined as of the time the agreement is entered into, not at the time enforcement is sought. “[S]ubstantive unfairness at the time of enforcement is no longer a proper basis for judicial invalidation,”<sup>133</sup> even if the increase in the husband’s wealth during the marriage was largely attributable to the wife’s efforts.<sup>134</sup>

The UPAA’s somewhat unbalanced balancing test does succeed in realizing one of the Commissioners’ stated goals: removing from the enforcement landscape the “substantial uncertainty as to the [validity] of all, or a portion, of the provisions of these agreements and [the] significant lack of uniformity of treatment of these agreements among the states.”<sup>135</sup> But the UPAA’s method of achieving certainty and uniformity sacrifices “virtually all principles that have been created by the common law to prevent the enforcement of unfair agreements.”<sup>136</sup> My proposal of universal unenforceability, without requiring such sacrifices, still offers the certainty and uniformity that the Commissioners sought.

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(iii) did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.

*Id.* (emphasis added). Some states, when they adopted the UPAA, altered the Commissioners’ language to make unconscionability a sturdier ground for objection. *See, e.g.*, CONN. GEN. STAT. § 46b-36g(a)(2) (2004) (proof of unconscionability at the time of execution or at the time when enforcement is sought suffices to prevent enforcement, even where full disclosure of assets was made); IOWA CODE § 596.8(2) (2003) (proof of unconscionability at the time of execution suffices to prevent enforcement, even where full disclosure of assets was made). Observe that the language of § 6 effectively assigns to the party seeking to avoid enforcement (typically the wife) the burden of proving that the agreement fails to satisfy the legal standard of voluntariness and conscionability. Indeed, some states that have adopted the UPAA require that she meet that burden “by clear and convincing evidence.” *See, e.g.*, N.J. STAT. § 37:2-38 (2005); R.I. GEN. LAWS § 15-17-6(b) (2004). Even some states that have not adopted the UPAA likewise assign the burden, by statute or by judicial decision, to the party seeking to avoid enforcement. *See, e.g.*, MINN. STAT. § 519.11, Subd. 5 (2004); *In re Estate of Benker*, 296 N.W.2d 167, 169 (Mich. Ct. App. 1980) (a “death-focused” prenuptial agreement). Some other non-UPAA states assign the burden to the party seeking enforcement. *Ex parte Williams*, 617 So. 2d 1032, 1034 (Ala. 1992).

<sup>132</sup>UNIF. PREMARITAL AGREEMENT ACT, § 6(c), 9C U.L.A. 49 (2001).

<sup>133</sup>*Developments, supra* note 74, at 2081.

<sup>134</sup>The UPAA does permit a court to disregard a prenuptial provision purporting to reduce or eliminate the challenging spouse’s rights to spousal support if the enforcement of the provision would render the spouse eligible for public assistance at the time of separation or dissolution. UNIF. PREMARITAL AGREEMENT ACT § 6(b), 9C U.L.A. 49 (2001).

<sup>135</sup>UNIF. PREMARITAL AGREEMENT ACT, prefatory note, 9C U.L.A. 36 (1983).

<sup>136</sup>Brod, *supra* note 7, at 276.

IV. WHY ENFORCING PRENUPTIAL AGREEMENTS IS *PER SE* INEQUITABLE

Marriage is a package deal; you cannot pick and choose. A married person cannot claim the shelter of the marital confidences privilege<sup>137</sup> and yet defy his employer's anti-nepotism policy against hiring the employee's spouse. He cannot claim special immigration status as a spouse<sup>138</sup> and yet exempt himself from the presumption that a child born to a married couple is the offspring of the husband.<sup>139</sup> You cannot have "the perks without the works."<sup>140</sup>

This equitable principle, barring an individual from simultaneously claiming the benefits and rejecting the burdens of a particular arrangement, enjoys a venerable pedigree that can be traced at least as far back as Justinian<sup>141</sup> and takes many forms. The formulation favored by Scottish law "is that a man shall not be allowed to approbate and reprobate . . ."<sup>142</sup> More commonly, modern Anglo-American legal authorities treat the principle as a corollary of the equitable maxim: "He who seeks equity must do equity,"<sup>143</sup> while others render the maxim more specifically: "[H]e who derives the advantage ought to sustain the burden."<sup>144</sup>

Although this principle has broad application today, it was originally confined to the law of wills,<sup>145</sup> where it was known as the doctrine of equitable election. "The law does not permit a beneficiary in a will to accept that which benefits him and reject that which operates to his prejudice."<sup>146</sup>

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<sup>137</sup>See, e.g., MINN. STAT. ANN. § 595.02(1)(a) (2000); MONT. CODE ANN. § 26-1-802 (2003).

<sup>138</sup>See 8 U.S.C. § 1153(d) (2000).

<sup>139</sup>See, e.g., *Gammon v. Cobb*, 335 So. 2d 261, 264 (Fla. 1976) (characterizing the presumption as "one of the strongest rebuttable presumptions known to the law"); *accord* *Feazel v. Feazel*, 62 So. 2d 119, 120 (La. 1952) ("the strongest presumption known in law").

<sup>140</sup>See James M. Donovan, *An Ethical Argument to Restrict Domestic Partnerships to Same-Sex Couples*, 8 LAW & SEXUALITY 649, 662 (1998).

<sup>141</sup>See J. INST. 2.20, p. 4.

<sup>142</sup>See 2 *Charles Fisk Beach, Jr., Modern Equity Jurisprudence* § 1068 (1892).

<sup>143</sup>*James W. Eaton, Handbook of Equity Jurisprudence* §§ 65-66 (2d ed. 1923).

<sup>144</sup>See, e.g., *Am. Car & Foundry Co. v. Smock*, 93 N.E. 78, 79 (Ind. Ct. App. 1910); *Fleming v. Taylor Fuel, Light & Power Co.*, 136 P. 228, 230 (Kan. 1913); *Oneida County Mobile Home Sales, Inc. v. Niagara Mohawk Power Corp.*, 407 N.Y.S.2d 89 (App. Div. 1978). And who among us can resist the Latin: *qui sentit commodum sentire debet et onus*? BLACK'S LAW DICTIONARY 1414 (rev. 4th ed. 1968).

<sup>145</sup>ASHBURNER'S PRINCIPLES OF EQUITY 473-76 (Denis Browne ed., 2d ed. 1933); *accord* *Beach* *supra* note 142, § 1070 (1892).

<sup>146</sup>*Oglesby v. Springfield Marine Bank*, 69 N.E.2d 269, 274 (Ill. 1946); *accord* *Jacobs v. Miller*, 15 N.W. 42, 45 (Mich. 1883) ("[A] person cannot claim under the instrument without confirming it. He must found his claim on the whole and cannot adopt that feature or operation which makes in his favor and at the same time repudiate or contradict another feature or operation which is counter or adverse to it.").

In *Elmore v. Covington*,<sup>147</sup> for example, X and Y had conveyed two houses to the testator before testator's death. When testator died, his will bequeathed the two houses back to X and Y (plus \$100 for each devisee). X and Y alleged that they had conveyed the two houses to testator pursuant to a contract whereby testator had promised to bequeath to them 9/13 of his estate, which amounted to more than the value of the two houses. A bequest of 9/13 of the estate would entitle X and Y to 9/13 of every asset or to whichever whole assets (chosen by the court, presumably) had a dollar value equal to 9/13 of the estate. But X and Y wanted to take the two houses whole under the will, and then receive by way of damages the amount by which the value of the two houses fell short of 9/13 of the estate. The court held that X and Y had to *elect* either to accept the will (i.e., take the two houses and the \$100 but nothing else) or to sue for breach of contract (in which case they would get 9/13 of every asset rather than the two houses whole). The court held that X and Y could not simultaneously accept the benefits under the will and seek specific performance of a promise notwithstanding the will.

In *Lawrence v. Coffield*,<sup>148</sup> Fritz and Clara were husband and wife, and all their property was community property. Fritz died first, and in his will he bequeathed a particular farm to Clara for life, and the remainder to tenants who had lived on the farm for many years. He bequeathed the residue of the couple's property to Clara. Because the farm was community property, Fritz had the right to bequeath only half of it; the other half belonged to Clara absolutely. Thus, when he bequeathed to the tenants a remainder interest in the whole farm, he was bequeathing property that did not belong to him. Some years later, Clara purported to convey to one Coffield her entire one-half interest in the farm plus her life estate in the other one-half (that is, the life estate in Fritz's one-half that Fritz bequeathed to her in his will). The court held that Clara no longer owned the "entire one-half interest" that she had purported to convey. Because she had accepted and used income derived from the entire residue rather than just the income from her community half, Clara had in effect elected to accept the benefit of the will (enjoying all the residue), so she had to accept the burden and thereby lost all remainder interests in both portions of the farm.

It is important to note that the doctrine of equitable election does not depend for its operation on the testator's intention. Even if Fritz, for example, genuinely believed he had the power to bequeath the entire farm—that is, even if he did not *intend* to put Clara to an election—the doctrine would still be applied and Clara would lose her interest in the remainder of the farm if she accepted income from Fritz's one-half of the residue.<sup>149</sup> Indeed, it would be, according to Lord Eldon, "against conscience" to allow her to enjoy Fritz's property yet keep her own.<sup>150</sup>

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<sup>147</sup>172 S.W.2d 809 (Tenn. 1943).

<sup>148</sup>468 S.W.2d 544 (Tex. Civ. App. 1971); *accord* *Andrews v. Kelleher*, 214 P. 1056 (Wash. 1923).

<sup>149</sup>*See* Neville Crago, *Mistakes in Wills and Election in Equity*, 106 LAW Q. REV. 487, 495 (1990); *see, e.g.*, *Padbury v. Clark*, 2 Macn. & G. [Macnaghten & Gordon's English Chancery Reports] 298 (1850), *reprinted in* 42 Eng. Rep. 115.

<sup>150</sup>*Ker v. Wauchope*, 1 Bli. 1, 22 (1819), *quoted in* ASHBURNER, *supra* note 145 at 50.

This equitable principle has been extended beyond the traditional area of wills.<sup>151</sup> In *De Walsh v. Braman*,<sup>152</sup> for instance, the plaintiff sought a court order in equity to compel the defendant to convey a tract of land to plaintiff. Defendant had spent money keeping the premises in repair, but he was no longer entitled to sue plaintiff at law to recover the cost of those repairs because the statute of limitations barred the debt. The court in equity held that plaintiff, as the price of getting the order directing defendant to convey to plaintiff, had to pay defendant the amount that defendant had expended in repairs, such debt being "an equitable right growing out of the same subject matter."<sup>153</sup> He who derives the advantage ought to sustain the burden.

And courts have quite properly applied the inverse of the principle: he who refuses to sustain the burden ought not to derive the advantage. Thus, in *Feliciano v. Rosemar Silver Company*,<sup>154</sup> the court held that if a man and woman were not married to each other at the time the man sustained personal injuries, the woman could not recover for loss of consortium even though they had cohabited for twenty years. "[The value of marriage to society] would be subverted by our recognition of a right to recover for loss of consortium by a person who has not accepted the correlative responsibilities of marriage."<sup>155</sup> If you want the perks, you must accept the works. Who would accept the works if he could get the perks without them?

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<sup>151</sup>The doctrine of equitable election shares some underlying assumptions with the taxpayer's duty of consistency. See Steve R. Johnson, *The Taxpayer's Duty of Consistency*, 46 TAX L. REV. 537, 538 (1991) ("[A] taxpayer . . . should not be permitted to reduce his tax bill by reporting that one thing is true and then, after expiration of the statute of limitations, recanting and taking a different position on a later return."). For instance, *Eagan v. United States*, 80 F.3d 13 (1st Cir. 1996), involved contributions to a 401(k) plan paid by an insurance company on behalf of a taxpayer. If the taxpayer was a common law employee of the insurance company at the time the contributions were made, then, pursuant to Internal Revenue Code of 1986 § 402(a), he could exclude those contributions from his gross income for the years in which the contributions were made but would have to include them in his gross income in later years when they were actually distributed to him. If, however, he was not a common law employee of the insurance company at the time of the contributions, then, pursuant to § 402(b), he would have to include the contributions in his gross income when they were paid into the plan but he could exclude them from gross income when they were later distributed. Mr. Eagan had, in earlier years, claimed that he was a common law employee of the insurance company, and therefore he had excluded the contributions from his gross income in those earlier years. But when he received a distribution of those contributions in a year after the statute of limitations barred the reassessment of his taxes for those earlier years, he claimed that he had not in fact been a common law employee in those earlier years and that, therefore, he should not be required to include those distributed contributions in his gross income for that later year. The court held that the rule of consistency barred the taxpayer from avoiding income tax in the later year pursuant to § 402(b) by claiming he was a nonemployee, when he had avoided income tax in the earlier years pursuant to § 402(a) by claiming he was an employee. 80 F.3d at 18-19.

<sup>152</sup>43 N.E. 597 (Ill. 1896).

<sup>153</sup>*Id.* at 600.

<sup>154</sup>514 N.E.2d 1095 (Mass. 1987).

<sup>155</sup>*Id.* at 1096 (emphasis added).

Today's law, for reasons of which I thoroughly approve,<sup>156</sup> treats a married couple as an economic unit: not in the old sense of coverture, with the husband totally in command and the wife a mere cypher, but in the modern sense of two willing persons liberally and reciprocally bound.<sup>157</sup> Indeed, federal tax law quite famously treats them as an economic unit: spouses may file a joint income tax return that makes no distinction between income earned by one spouse and income earned by the other;<sup>158</sup> gratuitous transfers between spouses do not give rise to transfer tax obligations;<sup>159</sup> sales or exchanges between spouses do not generate taxable gain or deductible loss;<sup>160</sup> the list goes on. Generally, this unitary treatment produces tax *advantages* for the couple, but not always.<sup>161</sup> For example, section 672(e) of the Internal Revenue Code provides that for purposes of the grantor trust rules,<sup>162</sup> powers or interests held by one spouse are deemed to be held by the other spouse. Suppose a Grantor establishes a trust whose income, in the discretion of the Trustee, is to be distributed either to A (unrelated to the Grantor), to B (also unrelated), or to the Grantor. The Grantor will have to pay the income tax on all the income, even if the income is in fact paid to A or B.<sup>163</sup> The Grantor cannot avoid this result by substituting her spouse for herself as one of the permissible distributees (that is, by authorizing the trustee instead to distribute income to or among A, B, and the Grantor's spouse). But she *could* avoid that result if she had a domestic partner and substituted the partner for herself. And the Internal Revenue Code is quite clear; if you qualify for the marriage bonuses, you must also accept the marriage penalties. A married person cannot elect to be exempt from section 672(e).

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<sup>156</sup>See *supra* text accompanying notes 15-26.

<sup>157</sup>It is not only *law* that presupposes that spouses are an economic unit. *In practice*, spouses are much more likely than domestic partners to pool their assets. A study of American attitudes found that about two-thirds of all spouses immediately after marriage favored pooling their assets, while fewer than one-third of all unmarried heterosexual cohabitants favored pooling them. J. Thomas Oldham, *supra* note 24, at 1424 n. 79 (citing PHILIP BLUMSTEIN & PEPPER SCWARTZ, *AMERICAN COUPLES* 94-95 (1983)). And an English study found that 24% of unmarried heterosexual cohabitants in fact kept their money separate, while only 6% of married couples did so. Oldham, *supra* note 24, at 1424 n.79 (citing Helen Clezer & Eva Mills, *Controlling the Purse Strings*, 29 FAM. MATTERS 35, 35 (1991)).

<sup>158</sup>See BORIS I. BITTKER, MARTIN J. MCMAHON, JR., & LAWRENCE A. ZELENAK, *FEDERAL INCOME TAXATION OF INDIVIDUALS* ¶ 44.02[2] (3d ed. 2002).

<sup>159</sup>I. R. C. §§ 2056, 2523, 2651(c)(1) (West 2005).

<sup>160</sup>*Id.* § 1041.

<sup>161</sup>Ronnie Cohen and Susan B. Morris, *Tax Issues from "Father Knows Best" to "Heather Has Two Mommies,"* 84 TAX NOTES, Aug. 30, 1999 at 1309, 1314 n.50 ("Overall . . . , the Congressional Budget Office estimated that the marriage bonus exceeds the penalty by approximately \$4 billion.").

<sup>162</sup>Ordinarily, a trust is a separate income-tax-paying entity, separate from the trust's grantor and the trust's beneficiaries. In certain circumstances, however, a grantor may have retained so much control over or so great an interest in the trust that the trust's gross income and deductions are imputed to the grantor. In such a case, taxable income realized by the trust will be reported by the grantor on *her* return and taxed to *her* at her marginal rates. I.R.C. §§ 671-77 (West 2005).

<sup>163</sup>I.R.C. § 677.

It is not only *tax* law that treats spouses as an economic unit. Many states have enacted statutes that grant a surviving spouse the eligibility to continue certain licensed businesses of the deceased spouse.<sup>164</sup> And in most states, “anyone who injures a married person is deemed also to have injured the spouse of that individual, and state laws allow the spouse to sue the tortfeasor for harm to the marital relationship.”<sup>165</sup> An interesting recent case founded on this notion of spousal unity is *International Association of Firefighters, Local 2665 v. City of Ferguson*.<sup>166</sup> The city’s charter provided that certain city employees would be discharged if they “directly or indirectly” campaigned for or contributed money to the campaign of any candidate running for mayor or city counsel. Lloyd was a firefighter employed by the city, and Alma was his wife. While it was clear that Lloyd would lose his job if he campaigned for a mayoral candidate, Alma was concerned that Lloyd would lose his job if *she* campaigned for a mayoral candidate. Clearly, Lloyd himself had standing to challenge the city charter provision on First Amendment grounds. The question was, did *Alma* have standing to contest the city charter provision on First Amendment grounds? That is, would Lloyd’s losing his job amount to an injury to Alma? The court held that it *would* be injury to Alma and that Alma therefore had standing.<sup>167</sup>

The economic unity of spouses is not a mere legal fiction or convenient (or inconvenient, as the case may be) concomitant of marriage. It is the very essence of marriage cast in practical form: an ineluctable condition of the intimacy and reciprocal dedication that is the marital bond.

It may be important to maintain property distribution and maintenance rules that assume a blending of interests and award property and maintenance at divorce based on a model of ongoing reciprocity, not individual self-fulfillment. Most important, the ideal of unity suggests that economic and political parity should be seen as a prerequisite for, not an impediment to, loving and selfless and honorable marriages. When both parties are capable of independence yet opt instead for a life of interdependence, the union formed is far less likely to fall victim to one-sided exploitation.<sup>168</sup>

Because a marriage *qua* marriage has an economic existence, it must follow that when one spouse seeks to dissolve the union, he cannot simply take his economic

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<sup>164</sup>See, e.g., D.C. CODE § 3-405(f) (2004) (funeral director); IND. CODE ANN. § 7.1-3-24-7 (2004) (liquor license). Cf. COLO. REV. STAT. ANN. § 39-3-203 (West 2003) (the surviving spouse of an owner-occupier of residential real estate who had enjoyed special real estate tax relief because he was over the age of 65 may continue to enjoy that tax relief even though she herself is *not* over 65).

<sup>165</sup>Bernstein, *supra* note 17, at 151 (citing DAN B. DOBBS, *THE LAW OF TORTS* 842-43 (2000)).

<sup>166</sup>283 F.3d 969 (8th Cir. 2002).

<sup>167</sup>283 F.3d at 975. *But see, e.g.,* English v. Powell, 592 F.2d 727, 730 (4th Cir. 1979) (“It is a novel theory that a wife possesses such a property interest in her husband’s position that a decrease in his salary gives her an actionable claim.”).

<sup>168</sup>Baker, *supra* note 18, at 832 (footnotes omitted).

marbles and walk away. The spouses' economic interests are so intertwined and have so lost—or perhaps never had—their individual ancestry that judicial intervention is required to oversee and even prescribe an equitable method of economic severance.<sup>169</sup> This imposition of exit costs on the wealthier spouse is part of the “works” of marriage that a person seeking the “perks” of marriage must, in fairness, bear.<sup>170</sup> Allowing him, by means of some sort of idiosyncratic governing instrument, to opt out of this marital property obligation is inequitable.

But *to whom* is it inequitable? Inconsistency may be aesthetically displeasing, even hypocritical, but it does not rise to the level of “inequitable”—“against conscience,” to use Lord Eldon's more censorious phrase<sup>171</sup>—unless it does consistent, predictable harm. The doctrine of equitable election<sup>172</sup> arose in the law of wills as courts came to understand that allowing a legatee to accept those provisions of a will that benefitted her while renouncing those that disfavored her had the effect of injuring the testator's other legatees. For example, suppose a testator's will provides, “I bequeath my 2,000 shares of General Motors stock to Smith, and I bequeath the proceeds of my Aetna life insurance policy to Jones.” Suppose further that the testator does indeed own the 2,000 shares of General Motors stock at his death, but the designated beneficiary of the Aetna life insurance is Smith, and under applicable law the testator may not change by will a designated beneficiary under a life insurance contract.<sup>173</sup> In other words, when the testator purported to bequeath the Aetna proceeds to Jones, he was in fact purporting to dispose of property that belonged to Smith. Under the doctrine of equitable election, if Smith accepts the benefit of the will (the 2,000 shares of General Motors stock), she will be compelled to “accept” the detriment; that is, she will be compelled to convey the Aetna insurance proceeds to Jones.<sup>174</sup> Allowing Smith to accept the stock *without* conveying the insurance proceeds to Jones would deprive Jones of a benefit that the testator intended to confer upon him. Indeed, if Smith elects to forgo the benefit of the will and keep the Aetna proceeds, she will still receive the General Motors stock in the first instance but she will be required to convey to Jones so much of that stock as will compensate Jones for the loss of the insurance proceeds.<sup>175</sup>

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<sup>169</sup>See *supra* text accompanying note 34-63.

<sup>170</sup>See *supra* text accompanying note 140.

<sup>171</sup>See *supra* text accompanying note 150.

<sup>172</sup>See *supra* text accompanying notes 145-50.

<sup>173</sup>See, e.g., Wanda Ellen Wakefield, Annotation, *Effectiveness of Change of Named Beneficiary of Life or Accident Insurance Policy by Will*, 25 A.L.R. 4th 1164 (1983).

<sup>174</sup>See, e.g., *In re Schaech's Will*, 31 N.W.2d 614 (Wis. 1948).

<sup>175</sup>2 Simes & Smith, *The Law of Future Interests* § 802 n.14 (Borron 3d ed. 2003). Thus, if the insurance proceeds were \$20,000 and the General Motors stock was worth \$80,000, Smith would have to convey one-quarter of the stock to Jones. But Smith could keep the remaining three-quarters of her bequest of the stock; the principle at work here is compensation, not forfeiture, since Smith had every right to retain the insurance proceeds that she owned before the testator's death. *Id.* But if Smith elects to take the benefit of the will, she would be compelled to convey the entire insurance proceeds to Jones, even if the insurance proceeds were worth more than the stock.



Allowing married couples to customize, by prenuptial agreement, the regime for property-division upon dissolution is unfair to—indeed, harms—same-sex couples who possess all the requisites of marriage except the stipulated genders.<sup>176</sup> Suppose Pat and Sandy are a same-sex couple who, because of local law, are forbidden to marry but not forbidden to form a domestic partnership.<sup>177</sup> Domestic partnership offers Pat and Sandy none of the social magic that marriage affords opposite-sex couples.<sup>178</sup> More to the point, it offers them none of the material advantages either.

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<sup>176</sup>My equitable argument against the enforceability of prenuptial agreements is founded on the belief that same-sex couples ought to be allowed to marry: that there exist no sound, moral grounds for denying them that right. But an extended reassertion of same-sex marriage rights on this occasion would produce an unwieldy and overlong article. Accordingly, I shall not try to convince any readers of the justice of same-sex couples' claim to marriage rights. I shall simply assume that readers are convinced already or, if they are not, commend to them the following writings in the hope that these will do the convincing: WILLIAM ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* (1996); MARK STRASSER, *ON SAME-SEX MARRIAGE, CIVIL UNIONS, AND THE RULE OF LAW: CONSTITUTIONAL INTERPRETATION AT THE CROSSROADS* (2002); Ralph Wedgwood, *The Fundamental Argument for Same-Sex Marriage*, 7 J. POL. PHIL. 225 (1999).

As of this writing, Massachusetts is the only American jurisdiction in which same-sex couples may legally marry. Belgium, Canada, the Netherlands, and Spain also permit same-sex couples to marry. *World Briefing Americas: Canada: Gay Marriage Approved*, N.Y. TIMES, July 21, 2005, at A6.

<sup>177</sup>Most states permit couples to form domestic partnerships, but the permission generally takes the form of statutory silence rather than a specific enabling statute. A few states have actually gone so far as to expressly *prohibit* domestic partnerships. See, e.g., GA. CONST. art. 1, § IV (2004) (prohibiting only same-sex domestic partnerships); LA. CONST. art. XII, § 15 (2005) (prohibiting both opposite-sex and same-sex domestic partnerships); NEB. CONST. art. I, § 29 (2005) (prohibiting only same-sex domestic partnerships); OHIO CONST. art. XV, § 11 (2005) (prohibiting both opposite-sex and same-sex domestic partnerships). Amendments like those in Georgia and Nebraska are particularly invidious. For a state to bar *all* couples from forming domestic partnerships might be defended, however unsatisfactorily, as an attempt to prevent the sanctioning of any form of cohabitation that does not have the benefit of a marriage license. But for a state to allow opposite-sex couples to “live in sin” while forbidding same-sex couples to do likewise cannot be defended at all. It is a naked display of anti-gay animus, and the federal Constitution forbids such legislative displays. *Romer v. Evans*, 517 U.S. 620, 632 (1996). Indeed, a federal district court, relying on *Romer*, recently held that the Nebraska amendment violates the federal Constitution. See *Citizens for Equal Prot., Inc. v. Bruning*, 368 F. Supp. 2d 980, 1002-04 (D. Neb. 2005).

<sup>178</sup>Marriage in America functions as a kind of credential. It sends a cultural signal, not only of the married person's “normality” but also of his trustworthiness, his maturity, his generosity, his attractiveness. Conversely, bachelorhood and spinsterhood send the opposite signals: unreliability, callowness, selfishness, unattractiveness. A bachelor has not been elected President of the United States since 1884, when Grover Cleveland was elected to his first term, and he in fact married less than two years after the inauguration. 6 COLLIER'S ENCYCLOPEDIA 620 (1970). In 2005, Boeing Co. fired its married chief executive for having a brief (heterosexual) affair with another Boeing employee, even though no pre-affair harassment was alleged. Renae Merle, *Boeing CEO Resigns Over Affair with Subordinate*, WASH. POST, Mar. 8, 2005, at A01. Although Boeing spokespersons protested that the company's decision was a reaction to the executive's bad judgment rather than to his infidelity, the fact remains that the company considered a man who was not faithfully married to be a less reliable executive than a man who *was* faithfully married. *Id.* Film critic Pauline Kael,

Except in those very few states that, by statute, grant certain marital privileges to “registered” unmarried couples,<sup>179</sup> Pat and Sandy have no reciprocal inheritance rights, no homestead rights as a survivor, no standing to maintain an action for wrongful death, no visitation rights if the other is hospitalized, no right to make medical decisions if the other becomes incapacitated. Furthermore, those jurisdictions that *do* grant particular rights to registered domestic partners frequently impose preconditions on the formation of a domestic partnership that are not imposed on marriages.<sup>180</sup> And even if Pat and Sandy married each other in Massachusetts, the one American jurisdiction that recognizes same-sex marriages, they still would be ineligible for any of the federal tax advantages granted to married couples generally.<sup>181</sup>

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famous for her scathing wit, was once scolded by a listener (Kael was at that time the film critic for Berkeley, California, radio station KPFA-FM) who attributed Ms. Kael’s acerbity to her being unmarried: “[Dear] Miss Kael, I assume you aren’t married—one loses that nasty, sharp bite in one’s voice when one learns to care about others.” See PAULINE KAEI, *I LOST IT AT THE MOVIES* 228 (1994).

The authors of the 1980 film comedy *Airplane!* (Paramount Pictures) poked some mischievous fun at our craving for marriage’s social magic. When one of the female flight attendants, Randy, learns that the eponymous aircraft is in danger of crashing, she starts to cry:

DR. RUMACK. Randy, are you all right?

RANDY. Oh, Dr. Rumack, I’m scared. I’ve never been so scared. And besides, I’m 26 and I’m not married.

DR. RUMACK. We’re going to make it, you’ve got to believe that.

[a Woman Passenger comes in]

WOMAN. Dr. Rumack, do you have any idea when we’ll be landing?

DR. RUMACK. Pretty soon, how are you bearing up?

WOMAN. Well, to be honest, I’ve never been so scared. At least I have a husband.

[Randy cries harder]

*AIRPLANE!* (Paramount Pictures 1980), available at <http://www.imdb.com/title/tt0080339/quotes>. The wonderful phrase “social magic” is not my own. See Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 959 n.42 (1995).

<sup>179</sup>See CAL. FAM. CODE §§ 297-299.6 (West 2004) (“domestic partners”); N.J. STAT. ANN. §§ 26:8A-1 to -12 (West Supp. 2005) (“domestic partnerships”); VT. STAT. ANN. tit. 15 §§ 1201-07 (2002) (“civil unions”); 2005 Conn. Acts 10 (January Sess.) (“civil union”). Hawaii has created the status of “reciprocal beneficiaries,” HAW. REV. STAT. §§ 572C-1 to -6 (1999), who, upon registration, are granted a few mutual rights, but reciprocal beneficiaries, unlike the parties registering under the California, Connecticut, New Jersey, or Vermont statutes, need not intend to make mutual emotional commitments and do not receive most of the state privileges attending marriage. *Id.* § 572C-6.

<sup>180</sup>California and New Jersey, for example, require the partners to share the same residence before they can register as domestic partners. CAL. FAM. CODE § 297(b)(1) (West 2004); N.J. STAT. ANN. §§ 26:8A-4(b)(1) (West Supp. 2005). No such cohabitation requirement is—or constitutionally may be—imposed on would-be spouses. *Turner v. Safley*, 482 U.S. 78, 95-96 (1987). See generally Jeffrey G. Sherman, *Domestic Partnership and ERISA Preemption*, 76 TUL. L. REV. 373, 386-89 (2001).

<sup>181</sup>Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 4219 (1996) (codified as amended at 1 U.S.C. § 7 (2000), 28 U.S.C. § 1738C (2000)):

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as

Compared with a married, opposite-sex couple, Pat and Sandy have only one advantage as domestic partners: at least, it is an advantage for the wealthier partner. The partner may, by contractual prearrangement, limit his or her financial obligations should the partnership dissolve. So long as heterosexual legislators (and their heterosexual constituents) can continue to enjoy all the advantages of marriage and yet capture, by means of enforceable prenuptial agreements, the one advantage still available to same-sex couples in domestic partnerships, they will have little incentive to end this invidious discrimination<sup>182</sup> either by creating for same-sex couples a more robust domestic partnership or by extending marriage rights to same-sex couples.

The intentional exclusion of same-sex couples from the benefits of marriage reflects a view of marriage as a sacred institution whose essence endures independently of the shifting preferences of legislatures and citizens.<sup>183</sup> But this view of marriage was repudiated by the prenuptial agreement revolution of the 1970s. Courts began to enforce prenuptial agreements only when they came to see marriage not as a sacred union but as a legal arrangement shaped for the convenience of spouses and would-be spouses.<sup>184</sup> And if marriage is purely a creature of secular law, offering by legislative fiat a number of disparate accompaniments designed to keep the package desirable (e.g., testimonial privilege, income-splitting for tax purposes, enforceable prenups to keep the exit costs low), then no logical basis exists for restricting that package to opposite-sex couples.<sup>185</sup> The argument for excluding

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husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.

*Id.*

<sup>182</sup>Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U.L. REV. 197, 216-19 (1994).

The central outrage of [male-male sex] is that a man is reduced to the status of a woman, which is understood to be degrading. Just as miscegenation was threatening because it called into question the distinctive and superior status of being white, homosexuality is threatening because it calls into question the distinctive and superior status of being male.

*Id.* at 235-36. See also *supra* note 177 and accompanying text.

<sup>183</sup>For example, Congressman Roscoe Bartlett (R-Md.) made the following remarks on the floor of the United States House of Representatives with respect to H.J. Res. 106, the Marriage Protection Amendment:

Mr. Speaker, there seems to be some confusion as to what constitutes marriage. In the Christian community, and we are a Christian Nation, you can affirm that by going back to our Founding Fathers and their belief in how we started, among Christians, marriage is generally recognized as having started in the Garden of Eden. You may go back to Genesis to find that and you will note there that God created Adam and Eve. He did not create Adam and Steve. A union between other than a man and a woman may be something legally, but it just cannot be a marriage, because marriage through 5,000 years of recorded history has always been a relationship between a man and a woman.

150 CONG. REC. H7888-02 (2004).

<sup>184</sup>See *supra* text accompanying notes 88-93.

<sup>185</sup>Indeed, the benefits derived by society when citizens are freed from the pressures of intimacy-competition (and thereby permitted to direct more of their energies outward toward the community at large) would presumably increase if that freedom were made available to same-sex couples. See *supra* notes 17-19, and accompanying text.

same-sex couples from marriage necessarily relies on the “sacredness” notion. But the recent and now-cherished availability of prenuptial agreements, which allow spouses to slip their sacred bonds inexpensively, undercuts that supposed commitment to sacredness and exposes this exclusionary policy as simply a policy of discrimination designed to maintain a social and legal hierarchy based on sexual orientation. Reviving the old rule that barred the enforcement of prenuptial agreements would somewhat mitigate this discrimination by reducing the range of the hypocrisy used to justify the discrimination and by denying married couples the inequitable opportunity of enjoying the perks without the works.

When the shoe is on the other foot and new circumstances provide same-sex couples with more household options than are available to opposite-sex couples, the authorities have refused to tolerate such “reverse” discrimination for long. Less than a year after Vermont’s groundbreaking civil union statute became effective,<sup>186</sup> the University of Vermont, which had been granting benefits to both married couples and same-sex domestic partners, announced that henceforth same-sex partners would qualify for university benefits only if they formally established a civil union and obtained a civil union license pursuant to the Vermont statute.<sup>187</sup> “A university spokesman said that not instituting the policy could be seen as *discriminatory against heterosexual couples* in long-term relationships[,] who must be married to obtain spousal benefits.”<sup>188</sup> Shortly after the Supreme Judicial Court of Massachusetts held that the state’s constitution required that same-sex couples be permitted to marry on the same terms as opposite-sex couples,<sup>189</sup> Boston’s Beth Israel Deaconess Medical Center announced that it would eliminate domestic-partner benefits for same-sex couples, for reasons analogous to those given by the University of Vermont. If same-sex couples wanted the Medical Center’s employee benefits, the couples had to marry.<sup>190</sup>

Just as these employers quite properly refused to allow same-sex couples to enjoy the perks (employee fringe benefits) without the works (marriage or registration) where opposite-sex couples could not, so the law should refuse to allow opposite-sex couples to enjoy the perks (marriage’s social and economic magic) without the works (the prospect of equitable distribution) where same-sex couples cannot.

## V. SPECULATIONS ABOUT STRATEGIC BEHAVIOR

Would a rule barring the enforcement of prenuptial agreements adversely affect the number of marriages? That is, are there so many people whose willingness to

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<sup>186</sup>“An Act Relating to Civil Unions,” VT. STAT. ANN. tit. 15 §§ 1201-07 (2005) (effective Apr. 26, 2000).

<sup>187</sup>Richard Higgins, UVM Revises Domestic-Partner Policy Legal Unions Now Required, BOSTON GLOBE, Sept. 28, 2000, at B3.

<sup>188</sup>*Id.* (emphasis added); see also Sherman, *supra* note 180, at 385 n.37.

<sup>189</sup>Goodridge v. Dept. of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

<sup>190</sup>*Equal Marriage, Equal Treatment*, THE ADVOCATE, June 8, 2004, at 20. But see Kimberly Blanton, *Benefits for Domestic Partners Maintained*, BOSTON GLOBE, Aug. 22, 2004, at G1 (noting that the Medical Center was persuaded to suspend its decision to abolish domestic partner benefits, inasmuch as a pending amendment to the state constitution casts doubt on the permanence of same-sex marriage rights in Massachusetts).

marry depends on their power to avoid equitable distribution upon divorce that the marriage rate would go down measurably if that power were removed?<sup>191</sup> This question of incentive is worth some speculation.<sup>192</sup>

Before indulging in that speculation, however, I must observe that an affirmative answer to my question—that is, a finding that the marriage rate would indeed go down if my proposal were adopted—does not necessarily argue against the proposal. As Professor Baker has urged, marriages conditioned on a prenuptial waiver may be less than deserving of all the encouragement and deference that society gives them.<sup>193</sup> Now some readers might object to the dismissal of such marriages. They might say, if an impecunious woman must choose between remaining single and entering into a financially one-sided marriage, who are we to disparage the latter choice? “[F]or those without power, sometimes the only alternative to a bad bargain is no bargain at all, and it is not clear why it always would be to someone’s benefit to have that choice taken away. . . . There may be situations when a woman would only be able to marry if she were able to bind herself to a premarital agreement, and she would prefer to be married with the agreement rather than unmarried and ‘protected’ from that agreement.”<sup>194</sup>

Two responses come to mind. First, my objection to prenuptial agreements does not spring from the belief that they hurt women. It springs from a belief that they are inequitable, given the rationale for the “tremendous . . . subsidies” that our society confers on married persons on account of their marital status.<sup>195</sup> And to perpetuate this inequity in the hope of benefitting marriageable women simply shifts the locus of victimization without addressing the root causes of women’s financial disadvantage. My second response is that eliminating prenuptial agreements might actually *enhance* women’s bargaining power. Under current law, a woman might be loath to reject a marriage proposal conditioned on her signing a prenop for fear that if she declined to sign it, her suitor would look elsewhere and find a woman who was willing to sign. Under my proposal, she would compete for her beau on her merits, not on her submissiveness. A man seeking the benefits of marriage would not be able to shop around for a more tractable candidate; he would have to choose between a life of celibacy and a life of marriage in the shadow of equitable distribution.

When one studies the American marriage rate over the last half-century, one notes that significant events in the shift toward routine enforcement of all prenuptial agreements—the *Posner* case (1970),<sup>196</sup> the Uniform Premarital Agreement Act (1983),<sup>197</sup> and the *Simeone* case (1990),<sup>198</sup> for instance—seem to have had no

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<sup>191</sup>Throughout this discussion, we shall assume that it is the man who is the wealthier and more independent of the two prospective spouses, *see generally*, Brod, *supra* note 7, and that if a change in the enforceability rules were to have any effect on marriage rates, it would have its effect by influencing men’s behavior rather than women’s.

<sup>192</sup>Unfortunately, speculation is all that is possible; the data necessary to support a true regression analysis have not been collected.

<sup>193</sup>*See* Baker, *supra* note 18, at 832.

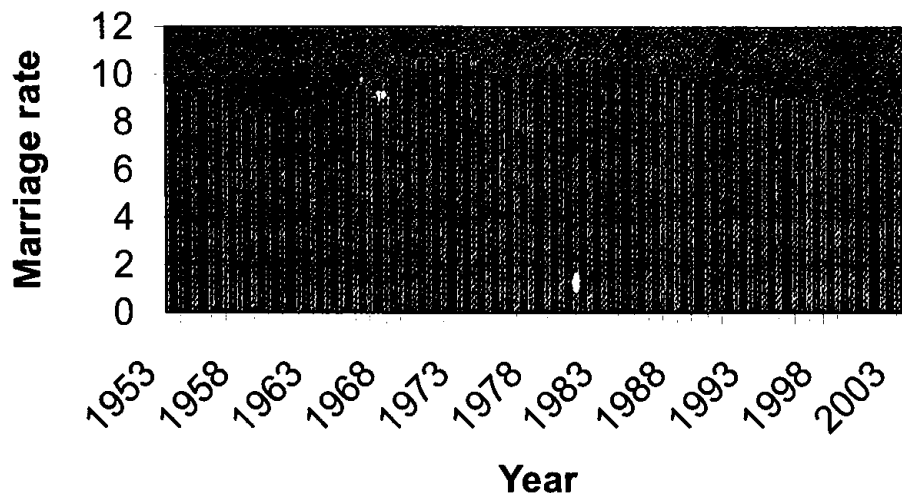
<sup>194</sup>Bix, *supra* note 5, at 206, 204.

<sup>195</sup>*See supra* note 9 and accompanying text.

<sup>196</sup>*See supra* note 5 and accompanying text.

<sup>197</sup>*See supra* note 128 and accompanying text.

observable impact on the statistics.<sup>199</sup> The following graph illustrates the changes in the annual American marriage rate (marriages per 1,000 total population<sup>200</sup>) from 1953 to 2003.<sup>201</sup>



If the marriage rate and the enforceability of prenuptial agreements bore some positive relation to each other, one would expect the marriage rate to have increased

<sup>198</sup>See *supra* note 121 and accompanying text.

<sup>199</sup>Another year that might provisionally be supposed to have affected marriage rates is 1992. The Employee Retirement Income Security Act of 1974 ("ERISA"), Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified as amended at 29 U.S.C. §§ 1001-1461 (1994 & Supp. V 1999)), guarantees certain benefits to the surviving spouse of an employee covered by an employer's pension benefit plan: benefits that cannot be taken away without the spouse's written consent. ERISA § 205, 29 U.S.C. § 1055. See generally 1 MICHAEL J. CANAN, QUALIFIED RETIREMENT PLANS § 7.16[C]-[F] (2005). Back when the provision was still new, many practitioners wondered whether a provision in a prenuptial agreement could serve as an effective waiver of this ERISA-mandated benefit, but in 1992 a number of cases made it clear that the benefit could *not* be waived prenuptially. See, e.g., *Nellis v. Boeing Co.*, 1992 U.S. Dist. LEXIS 8510 (D. Kan. 1992); *Zinn v. Donaldson Co.*, 799 F. Supp. 69 (D. Minn. 1992); *Hurwitz v. Sher*, 789 F. Supp. 134 (S.D.N.Y. 1992), *aff'd*, 982 F.2d 778 (2d. Cir. 1992). Interpreting ERISA § 205(c)(2), 29 U.S.C. § 1055(c)(2), these courts held that only an employee's "spouse" can effectively waive her § 205 rights; and at the time of signing a prenuptial agreement she is not yet a spouse but only a fiancée. Thus, beginning in 1992, prospective husbands knew very well that a prenuptial agreement would not be enforced to the extent it purported to dispose of the wife's survivorship rights in the husband's pension. It would be unsound, however, to regard these 1992 developments as a trial run for my proposal, inasmuch as my proposal deals with enforceability on *divorce*, not with the much less controversial questions of enforceability on death. See *supra* note 5 and accompanying text. ERISA does not mandate any spousal benefits in the event of divorce.

<sup>200</sup>For census years, "population" means population enumerated as of April 1 of that year. For all other years, population is estimated as of July 1.

<sup>201</sup>These statistics were collected from the relevant issues of the Ctrs. for Disease Control & Prevention, U.S. Dept. of Health & Human Servs., Monthly Vital Statistics Reports.

in the years since the agreements first became routinely enforceable. Yet, except for a brief upsurge in the late 1970s and early 1980s, the marriage rate seems to have fallen steadily over the past thirty-five years. And in the years from 1958 to 1969, years when divorce-focused prenuptial agreements were *not* enforceable, the marriage rate increased rather sharply.

Fluctuations in the marriage rate seem to have occurred independently of developments in the law of prenuptial agreements. Those who have compiled and studied these data attribute the fluctuations to “demographic and behavioral changes”<sup>202</sup>

One reason for the recent decline in the marriage rate is that the majority of the very large baby boom cohort (people born between 1946 and 1964) have aged past their twenties and thirties, which are the peak marriage years. In addition, it has been estimated that the percent of adults expected [ever] to marry has dropped from 95 to 90 percent.

The general decline reflected in the marriage rate per 1,000 population is also evident in rates for the population eligible to marry, unmarried men and women 15 years of age and over. These rates have been declining for more than 20 years and were lower in 1994 than in 1993. The marriage rate per 1,000 unmarried women 15 years of age and over in 1994 (51.5) was 2 percent lower than the rate in 1993 (52.3). The decline in the comparable marriage rate for unmarried men was 3 percent, from 61.4 in 1993 to 59.5 in 1994.<sup>203</sup>

If one is concerned about minimizing strategic behavior in connubial decisions, one must admit that prenuptial agreements themselves provoke considerable strategic behavior. For example, scholars and practitioners have long recommended that prospective spouses include a “sunset” provision in their prenuptial agreements: a provision that phases out or abruptly eliminates contractual limitations on each spouse’s claims to the other’s property after the marriage has lasted for a specified number of years. “[P]renuptial agreements are designed to govern a relationship not yet begun, one that may be fragile at the time of drafting but grows strong and durable over the years.”<sup>204</sup> Yet this seemingly benign provision can actually goad an

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<sup>202</sup>GOPAL K. SINGH, T.J. MATHEWS, SALLY C. CLARKE, TRINA YANNICOS & BETTY L. SMITH, CTRS. FOR DISEASE CONTROL & PREVENTION, ANNUAL SUMMARY OF BIRTHS, MARRIAGES, DIVORCES, AND DEATHS: UNITED STATES, 1994 (1995), available at [http://www.cdc.gov/nchs/data/mvsvr/mv43\\_13.pdf](http://www.cdc.gov/nchs/data/mvsvr/mv43_13.pdf).

<sup>203</sup>*Id.* The authors of the summary do not specify the “behavioral changes” that have reduced “the percent of adults expected [ever] to marry,” but presumably these changes include the increased social acceptability of nonmarital cohabitation, out-of-wedlock births, and homosexuality (that is, less pressure on gay people to choose marriage as a way of hiding), and a general pessimism about marriage engendered by the discouragingly high divorce rate. See generally Robert D. Mare & Christopher Winship, *Socioeconomic Change and the Decline of Marriage for Blacks and Whites*, in *THE URBAN UNDERCLASS* 175 (Christopher Jencks & Paul E. Peterson eds. 1991).

<sup>204</sup>Leah Guggenheimer, *A Modest Proposal: The Feminomics of Drafting Premarital Agreements*, 17 WOMEN’S RIGHTS L. REP. 147, 207 (1996); see also, Bix, *supra* note 5, at 179-82.

ambivalent spouse into divorce proceedings as the sunset deadline approaches, lest he forfeit the financial insulation the agreement provides him.<sup>205</sup>

Indeed, it is difficult to envision a legal design that does *not* invite strategic behavior. In *In re Honigman*,<sup>206</sup> a man bequeathed to his wife, whom he had come to loathe,<sup>207</sup> the rather odd sum of \$2,500 outright plus a life interest in one-half of the residue of his estate.<sup>208</sup> Why did this unhappy husband make this somewhat curious bequest? Why not leave her nothing at all? Or why not leave her \$500 instead of \$2,500? New York's elective share statute at the time granted a spouse in Mrs. Honigman's position the right to renounce her husband's will and claim one-half of his estate outright, regardless of how little the will itself purported to leave her. However, this same statute also denied the wife this "forced share" in the event the husband's will left her at least \$2,500 outright and bequeathed at least one-half the residue in trust for her lifetime benefit.<sup>209</sup> Now Mr. Honigman's motive for his curious bequest becomes clear. The amount was neither whimsical nor arbitrary; it was strategic. He left her the minimum amount that would bar her from claiming her elective share. Contractual terms, common law default rules, and statutory rules all prompt individuals to act differently from the way they would act in the absence of those terms or rules, so it is foolish to object to a rule merely because it will cause individuals to alter their behavior in calculating ways.

## VI. CONCLUSION

Prenuptial agreements should be held *per se* unenforceable to the extent they purport to limit a spouse's entitlements to alimony or equitable distribution of property in the event of divorce. To allow married persons to cherry-pick the concomitants of their marriage—to avail themselves of the advantages the law confers upon them while evading, by governing instrument, the burdens the law would impose upon them—is inequitable. If they want the perks, they must take the works. If a marriage-bent couple wishes to preserve the low exit costs associated

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<sup>205</sup>Donald Trump and his second wife, Marla Maples, executed a prenuptial agreement that capped her rights in Mr. Trump's property in the event of divorce at \$1 million to \$5 million, instead of the equitable distribution share of Trump's total wealth to which she would have been entitled without the contract. The contract contained a sunset provision, however, and Trump filed for divorce only eleven months before the sunset provision extinguished the contractual cap. The *New York Times* reported that Trump's timing in filing for divorce was not coincidental. "[He] has been forced economically to act." Bruce Weber, *Donald and Marla Are Headed for Divestiture*, N.Y. TIMES, May 3, 1997, at 127. Had Jack Welch acted before the sunset deadline in *his* prenuptial agreement, he would have saved a great deal of money. See Keil, *supra* note 79. Actor Tom Cruise and his second wife separated only days before their tenth anniversary. At the time Cruise filed his petition for divorce, "California courts presumptively awarded lifetime support to spouses married at least ten years before separation. In marriages of shorter duration, the California custom ha[d] been to award support for, at most, half the duration of the marriage." Oldham, *supra* note 24, at 1422.

<sup>206</sup>168 N.E.2d 676 (N.Y. 1960).

<sup>207</sup>*Id.* at 677.

<sup>208</sup>*Id.*

<sup>209</sup>JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, & ESTATES 172 (6th ed. 2000).



with domestic partnership, then the couple must settle for domestic partnership in its entirety.